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Investing in Our Children

Families in the Eyes of the Law

Contemporary Challenges and the Grip of the Past

Robert Leckey

IRPP

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Investing in Our Children/Investir dans nos enfants

Research Director / Directrice de recherche
Sarah Fortin

This research program examines issues related to family policy from the perspective of lifetime investment in human capital based on in-depth empirical and analytical evidence of the strengths and weaknesses of current policies as well as evidence supporting alternative strategies. The IRPP's research in this area focuses on recent developments across the country in policies that are geared toward children.

Ce programme de recherche examine les politiques publiques familiales selon une perspective d'investissement à long terme dans le capital humain et sur la base d'études empiriques et analytiques des forces et faiblesses de nos politiques actuelles, et explore des stratégies de rechange. Il met l'accent sur les récents choix des gouvernements fédéral et provinciaux en matière de politiques destinées à l'enfance.

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Contents

2 Introduction
5 Marriage and Divorce
11 Other Adult Relationships
19 Adults and Children
28 Policy Discussion
32 Conclusion
34 Notes
37 References
41 Résumé
42 Summary

Families in the Eyes of the Law

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Introduction

In recent years, the family life of Canadians has collided repeatedly with legal definitions of family. January 2009 witnessed the laying of criminal charges for polygamy practised in Bountiful, British Columbia (Matas 2009). The same month, a trial took place in Montreal in which a woman sued the multi-millionaire she had once lived with, seeking $50 million of his assets and $56,000 per month in alimony. Her claim challenged the constitutionality of both Quebec's family law and federal marriage law (Peritz 2009). In a path-breaking decision in 2007, an Ontario court declared a child to have a third parent.[1] And it was only in 2005 that the Parliament of Canada made same-sex marriage possible across the country.[2]

Interestingly, despite the challenges and important legal changes to our understanding of family, Canadian law has no official definition of "the family." For lawyers, the family – in a circular way – is the aggregation of the relationships, rights and obligations connecting those individuals who are otherwise seen as forming a family. So the relationships and duties of parents and children form a legal family, but the relationships and duties of neighbours do not. Relations between married spouses and between parents and children have been family law's traditional preoccupations. But the boundaries can shift, and recognition of family relationships by contemporary laws exceeds these categories.

Legal rules in Canada currently recognize family relationships in many, often inconsistent, ways. Talk about family relationships can be confusing because the same words can take different meanings in one setting than in another (Kasirer 1999). The word "spouse" may mean something different in an invitation to a party, in rules fixing eligibility for welfare

IRPP Choices, Vol. 15, no. 8, July 2009

and in rules imposing support obligations. People's definitions of family for themselves – how many pet owners view their domestic animal as a family member? – often differ from those in legal instruments. In a reminder that family practices can develop independently from legal rules, many same-sex partners referred to one another as "spouse" years before laws recognized them as such. Moreover, institutions in the private sector, such as employee benefit plans or the social pages of a newspaper, may recognize commitments that the laws of the state will not.

Difficulties in defining families connect to policy debates as to how governments should treat families and what programs they should provide so as to increase the well-being of family members. In recent years, such debates have considered topics such as parental leave, income splitting and child care. These debates engage controversial questions about the role of the state, the best use of scarce resources and intergenerational equity. In ways often left implicit, these debates connect to family law because they take definitions of family relationships for granted. Legal rules identifying family relationships and establishing their effects form the background for government programs and interact crucially with them. Discussion of the appropriate role of government in relation to families thus requires a clear sense of the state of the law, both past developments and the current regimes.

With an eye on these policy debates, this study aims to provide such an understanding of the past and present state of family law. The remaining subsections of this introduction identify key concepts necessary for understanding family law and set out the paper's two arguments and the content of the four principal sections.

Crucial oppositions and legal backdrop

Four oppositions weave through the study. They help make sense of the developments studied and indicate areas of tension.

The first, concerning the parties to whom laws are addressed, opposes private and public family law. *Private* law regulates the relationship between persons and between persons and property. Rights and duties operate between family members as a consequence of their relationships. Specifically, the private law of the family treats matters of status and property as between family members, especially parents and children, on the one hand, and between adult intimate partners, on the other. *Public* law concerns the relationship between individuals and the state. In the family context, it consists largely of the programs through which governments carry out redistribution and deliver goods and services to individuals by virtue of their family relationships. Government policies such as taxation and social welfare help produce the family in law (Diduck and O'Donovan 2006).[3] In recent years, the public side of family regulation has become more prominent, partly driven by rights claims under the Canadian Charter of Rights and Freedoms (Harvison Young 2001). Yet regulatory schemes that define family relationships for distributive purposes, such as workers' compensation, date back to the nineteenth century. As the study discusses, private regulation and public regulation of families connect, as when a welfare scheme requires a claimant to enforce all possible private claims for support.

The second opposition arises between different reasons for identifying family relationships. Some forms of family recognition are *instrumental*: they are the instrument for applying legal rights and duties so as to achieve some purpose. The private law of the family uses marriage as a means for imposing duties of mutual support. The public law of the family takes conjugal relationships as a signal of interdependence, making appropriate the conferral of a survivor's pension. Both the private and the public laws of the family use the legal bond between parents and children for the imposition of rights and duties. By contrast, some forms of family recognition have *noninstrumental* or *symbolic* value – that is, whatever their use, the legal recognition of some family bonds is understood as intrinsically valuable. Such recognition celebrates or affirms the relationship in a way that exceeds the enforceable legal content. For instance, the quest for same-sex marriage concerned the symbolic value of marriage, not only its rights and duties (MacDougall 2001). To be clear, calling a form of legal recognition "symbolic" should not imply that it is unimportant. Symbolic recognition may be intensely important to individuals and groups, a point underlying the struggles for legal recognition of various parental and conjugal relationships.

The third opposition consists of different bases for recognizing family relationships. Some rules of family law attach consequences to relationships on a basis that is *formal*. The classic formal bases for recognizing family relationships are marriage and parentage or filiation.[4] The contrasting basis for recognizing family relationships is *functional* – namely, that the individuals have functioned similarly to the members of formally recognized family relationships. Recognition of unmarried cohabitation and of sustained conduct as a parent are examples of the functional approach.

A functional approach often takes individuals' conduct as an implicit commitment to the relationship.

The fourth contrast opposes not dimensions of family regulation, but political conceptions of equality.[5] *Formal* equality refers to identical treatment of individuals who are similarly situated. It drives toward sameness of treatment, a background state of affairs against which individuals achieve different outcomes in the market. *Substantive* equality is concerned with securing equal respect for different individuals in a way that takes their differences into account.[6] It can lead to respectfully designed differences that recognize and affirm individuals' characteristics, often concerning itself with equality of opportunity, if not equality of result. The relation between formal and substantive equality animates key issues in family law. For example, legislative reforms have made men and women formally equal in marriage, but women disproportionately experience economic disadvantage on divorce. They also continue to carry out disproportionate amounts of caregiving. That is why this study examines how well legal reforms to produce equality have translated into actual economic equality by looking at patterns of domestic and market labour.

What are the relationships among the four oppositions? Separating them is important for analytical clarity. Nevertheless, they do not interact in wholly random ways: some groupings are more common than others. The formal bases for recognizing relationships, such as marriage and filiation, are creatures of the private law; they usually engage both instrumental and symbolic dimensions. By contrast, the functional bases for recognizing relationships usually engage only the instrumental dimension. Public-law regimes typically recognize relationships for instrumental purposes, often using formal as well as functional means. It may be justifiable for law and policy to depart from such typical alignments, but, as discussed below, a departure from this pattern can also signal a potential incoherence in policy.

Before proceeding, a word about the structure of this field of law is in order. The *Constitution Act, 1867* divides legislative power over the family, granting the provincial legislatures exclusive jurisdiction over family matters generally as part of their power over property and civil rights in the province, while assigning exclusive jurisdiction over marriage and divorce to Parliament. Another key constitutional feature is that the civil law provides the fundamental private law in Quebec, while the common law does so in the other provinces. These arrangements lead to the possibility that family will be defined differently in the two orders of government as well as from one province to the next. The chief sources of family law are the federal statutes and regulations, which apply across the country; the statutes and regulations of each province – in Quebec, the Civil Code; and the judgments of courts interpreting and applying those laws. The Supreme Court of Canada is the highest judicial authority for federal and provincial law. In principle, the Court's judgments relating to federal laws apply in all provinces, although it is sometimes thought that the distinctness of Quebec's civil law of the family should condition the application of those judgments in that province. By contrast, when the Court interprets a provincial law or rules on a Charter challenge to such a law, its ruling does not apply directly in other provinces, although the principles emerging from such a judgment are highly relevant to other provinces, provided their own laws are sufficiently similar to the one considered. Since assessments as to the relative similarity or distinctiveness of provincial laws can vary, the impact of a Supreme Court judgment concerning a law from one province on the law of another can be a matter of considerable debate. In the light of this background, this study necessarily discusses both provincial and federal law and attends to both common- and civil-law regimes of the family in Canada. For simplicity's sake, for most purposes it takes Ontario as a representative common-law province.

The arguments of this study

Adopting a legal perspective, this study surveys Canadian family law. It provides a nutshell account of changes to that law in the twentieth century, lays out the broad outlines of family regulation today and sets out the legal rules in an empirical context of data on family practices. It traces the four oppositions identified above through the field of Canadian family law.

In the course of this survey, the study advances two arguments. The first draws together the opposition between private and public family law, instrumental and symbolic reasons for recognizing relationships and formal and functional bases for doing so. At first blush, the varying rules and approaches might be taken as indicating a disorderly field or "chaos" (Dewar 1998). Yet, however unruly the mass of rules and principles might appear, some order can be discerned. The variety of approaches point, collectively, to the insight that a meaningful and coherent family policy must attend,

explicitly and simultaneously, to families as a matter for both private law and public law. It must also use formal as well as functional bases for recognizing relationships, ones that acknowledge the need for symbolic recognition of some relationships as well as, instrumentally, the importance of addressing the needs that arise from those and other relationships. The argument is not that the tension of these oppositions can be overcome; rather, such tension is an inescapable feature of family regulation in a plural society. A subsidiary to this argument about the multiple dimensions of family law is the striking contrast that will emerge in the case of Quebec, between that province's progressive and prominent public policy in family matters and a restricted definition of the family in its private law that is arguably out of line with social practices.

The second argument is that law reform and family life in Canada show that formal equality does not necessarily bring about substantive equality. This observation does not call for rejecting formal equality. Indeed, the attainment of formal equality in many areas of family law has been an important step forward. But the observation underscores formal equality's limits, especially within the private law of the family. The ways in which economic imbalance has survived the legal equalization of different family members – wives to husbands, children born outside marriage to children born within – highlights the need for a robust family policy, on the public-law side, in order to realize Canadian society's commitment to substantive equality.

Both arguments unfold across the paper's four main sections. The next section focuses on marriage and divorce. With an eye primarily on opposite-sex married couples, it provides a brief historical survey of the reforms of the past decades and addresses the contemporary regime during the relationship and afterwards. The third section surveys legal responses to the family practices of unmarried, opposite-sex cohabitants and of same-sex couples, both located outside traditional marriage. The fourth section traces the recognition of parental status and its effects, as well as the uneven application of some such effects to nonparents. Both the third and fourth sections show the grip of the past: the extension of family law has often remained in the shadow of the fundamental concepts of marriage and parentage. Although policy considerations emerge throughout the study, the last section focuses squarely on policy matters looking forward. It examines the limits of the private law of the family for securing the material well-being of family members, collects the recommendations for legal reforms set out throughout the preceding sections and presents lessons for revisions to public programs relating to families.

Marriage and Divorce

Marriage obviously has important social, economic, affective and, for many, spiritual elements. For present purposes, the starting point is marriage's situation relative to the oppositions animating this study. Marriages attract consequences within regimes of private and public law. Legal recognition of marriage has instrumental value in the rights and duties it brings. It also has symbolic value in its public validation of a relationship. In terms of the bases for recognizing relationships, marriage is the paradigmatic case of formal ordering. It begins with a ceremony in which the partners exchange explicit, informed consent. Its conclusion is also formal: marriage is dissolved by the death of one spouse or by a judgment of dissolution. Assuming that the consent of spouses was free and informed, marriage seems consistent with individuals' autonomy.

This section consists of four parts. The first recounts legislatures' implementation of formal equality for women within marriage, which can be seen as an improvement to the law of marriage. At the same time, the increased social acceptability of other forms of intimacy and the enlarged access to divorce can be seen, at least somewhat, as having displaced marriage as the sole form of legitimate union, resulting in "the decline of marriage" (Le Bourdais and Lapierre-Adamcyk 2004). The second part shows the gap between formal equality in terms of legal rights and duties within marriage contrasted with data on the economic roles of spouses. The third part sets out the regimes applicable on divorce, when the resources of one household are divided between two. The second and third parts indicate that the legislative adoption of formal equality has not produced substantive economic equality. The fourth part acknowledges the interaction of religious rules relating to marriage with the state's and identifies some of the resulting tensions and policy challenges.

The improvement and partial displacement of marriage

Marriage has been the subject of much public debate. Indeed, there have been significant changes to the legal framework of marriage during the past century and a

half. Developments have transformed three of its traditional hallmarks.

The first is the gendered character of marriage law. Husbands and wives historically had different roles, rights and duties during marriage. Statutes and common-law doctrines empowered men with decision-making authority on material and moral matters. In return for this authority, rules required men to support their wives. On marriage, a woman's legal personality would merge into her husband's, so that men exercised women's civil rights – rights of property and contract, the initiation and defence of lawsuits – on their behalf. One consequence of this merger of legal personality was that it was impossible for one spouse to sue the other. In what was referred to as the married woman's emancipation, reforms eventually equalized the rights and obligations of spouses during marriage. The process began in the common-law provinces in the 1880s (Girard 1990), though in Quebec not until the 1960s (Brisson and Kasirer 1996). At least formally, legislatures have now equalized the roles, rights and duties of spouses within marriage.

The second traditional hallmark is the status of marriage as the sole legitimate institution for sexual relations and child rearing. Historically, the legitimacy of marriage contrasted with the illegitimacy of other adult intimacy. Now, however, unmarried conjugality enjoys greater social acceptance than it did in the past (Milan, Vézina, and Wells 2007, 8). Legal changes also took place, with legislatures repealing the rules penalizing unmarried relationships, notably ones nullifying gifts from one unmarried partner to another and prohibiting gifts made by will. This step eliminated law's explicit disapproval of cohabitation (Allard 1987). Moreover, as is recounted below, the legislatures of most provinces now subject unmarried opposite-sex couples to the same reciprocal duty of support as married spouses, and Canadian law no longer distinguishes between married and unmarried parents in setting out their rights and duties relating to their children.

The third hallmark is the intended permanence of marriage. Under Quebec's 1866 Civil Code, for example, only the death of a spouse dissolved the marriage.[7] Indeed, until Parliament enacted uniform legislation relating to divorce in the late 1960s, divorce laws across the country were a complicated patchwork of predominantly nineteenth-century English law.[8] The increased availability of divorce in the last third of the twentieth century, however, diminished the permanence of marriage. It also aggravated the difficulty of disentangling the finances of husbands and wives. At one time, men typically held title to property acquired during the marriage. Consequently, the mere legal capacity of women to hold and manage their own property often failed to secure them anything like an equal share on the end of the marriage (Cullity 1972). The perceived injustice of women's exiting marriages with negligible assets, or none at all, generated pressure for reform of divorcing couples' property relations (Jacobson 1975). The 1968 *Divorce Act* set out in vague, discretionary terms the power of a judge to order one spouse to pay "corollary relief" to the other,[9] and, in the 1970s and 1980s, the common-law provinces and Quebec enacted a number of reforms that moved toward the principle of the sharing of the growth in the spouses' wealth during marriage. Now, dissolution of a marriage requires limited resources to be allocated so as to make two viable households out of one.

During marriage: formal equality and gendered difference

The provinces regulate the symbolic validation of marriage in the form of its solemnization. They also regulate, instrumentally, the rights and duties of spouses during marriage, although provincial rules fill in the legal content of marriage in ways of which spouses may be only dimly aware. In all provinces, maintenance or family relations statutes – in Quebec, the Civil Code – set out the obligation of spouses to support one another.[10] These obligations continue during a factual or legal separation.

Legislative announcements of spousal duties are cast in gender-neutral terms. Ontario law speaks of the necessity of recognizing the "equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership."[11] This declaration is fully consistent with a specialization of labour that yields different amounts of income. Indeed, Quebec's Civil Code contemplates that spouses may contribute toward the expenses of the marriage by domestic activities.[12]

However formally equal spouses may be in their rights and duties, significant gender differences persist in patterns of domestic and market labour. These patterns affect women's contribution to household income. Two-fifths (39.3 percent) of women in opposite-sex couples contribute one-quarter or less of the family revenue; 28 percent of women contribute more than one-half. Indeed, as table 1 shows, in households

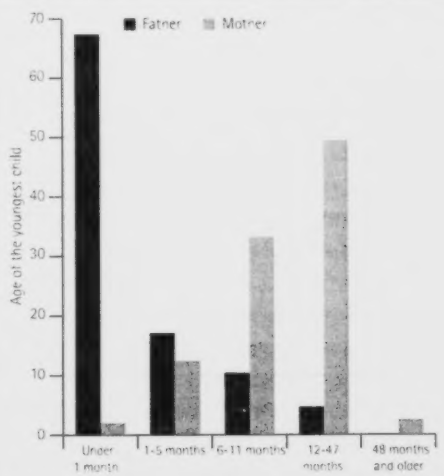
Table 1
Wife's Contribution to Employment Income in "Husband-Wife" Families,[1] Canada, by Number of Children, 2006 (Percent)

	All wives	No children	1 child	2 children	3 or more children
Wife's contribution to family income (%)					
0	19.7	23.6	17.0	15.3	21.5
1-25	19.6	14.3	21.4	24.0	25.4
26-50	32.7	29.1	34.2	37.0	32.4
51-75	14.7	15.1	15.0	14.9	12.2
76-99	5.1	6.1	5.0	4.2	3.8
100	8.2	11.8	7.4	4.7	4.7
Number of families with employment income[2]	6,283,630	2,515,760	1,494,380	1,590,680	682,810

Source: Statistics Canada, CANSIM database (table 101-0021).
[1] A husband-wife family consists of a man and woman living together (whether married or common law), with or without children, at the same address.
[2] The table includes only husband-wife families with positive employment income. Employment income includes wages and salaries, commissions from employment, training allowances, tips and gratuities and net self-employment income (business, professional, commission, farming and fishing income).

where there are no children, nearly one-quarter (23.6 percent) of women make no direct financial contribution to the family income, while another 37.9 percent contribute one-quarter or less of the couple's employment income, and 67 percent contribute 50 percent or less of employment income. The arrival of children, however, contributes significantly to the gendered differentiation of labour. In households with two children, 39.3 percent of women contribute one-quarter or less of the family income, while 76.3 percent contribute one-half or less. In families with three children, 79.3 percent of women contribute one-half or less of employment income.

Figure 1
Age of Youngest Child When Parents Go Back to Work after the Birth of a Child, Canada, 2006



Source: Beaupré and Cloutier (2007, chart 4).

Moreover, as figure 1 shows, women spend much more time out of the workforce after the arrival of their youngest child than do men, which affects the work experience and earnings of women relative to the men with whom they are in a relationship. As well, during the marriage, that role may condition the spouses' choices, and may establish a pattern in which the woman has a larger role in child care; should the marriage end, that pattern may influence a judge's allocation of child custody. Family law regimes do not, explicitly, channel women toward domestic work over paid work relative to men. Yet the different roles spouses perform during marriage give critical importance to the distributive rules that apply when a relationship breaks down.

From one household to two

After Parliament enacted a divorce law in the 1960s, the divorce rate increased significantly: between 1971 and 1982, the annual number of divorces more than doubled, as did the divorce rate per 100,000 population (Gentleman and Park 1997, 54). The numbers and rates of divorce declined from 1982 to 1985, which suggests that some couples might have postponed their divorce in anticipation of legislation that would further liberalize access to it. Indeed, the 1986 *Divorce Act* made breakdown of the relationship the sole ground for divorce and reduced the evidence required to support the claim.[11] During the two years after introduction of the new law, the numbers and rates of divorces rose dramatically: in 1985, there were 1,040.2 divorces per 100,000 legally married couples; in 1987, the peak year, there were 1,585.8 divorces per 100,000 legally married couples.

Divorce rates declined and levelled off in the 1990s, however, and the 1995 rate of 1,222 divorces per 100,000 legally married couples was not much higher than the 1982 rate of 1,215 (Gentleman and Park 1997, 55). For 2004, Statistics Canada reported a divorce rate of 10.6 per thousand legally married couples.[14]

Divorce produces effects of many kinds for spouses, children and extended family members. Its chief legal effect, one with instrumental and symbolic resonance, is the change in the marital status of the spouses. Its chief economic effect is the division of property and income between two households. Divorcing spouses may take into account a wide range of rules, including religious precepts, economic imperatives, social rules and state laws. Whether it is negotiated or, failing agreement, decided by a judge, a divorce settlement often draws on two bodies of legal rules: provincial legislation on the division of matrimonial property and federal divorce legislation on spousal support, child support and child custody.

The rules for the sharing of property typically grant each spouse an automatic entitlement. The point applies to equalization of family property in the common-law provinces and partition of the family patrimony in Quebec. The various provincial regimes are uniform in presuming an equal sharing of the increase in those assets during the marriage,[15] although they differ somewhat in the basket of assets on which they operate (Payne and Payne 2006, 445-6; Pineau and Pratte 2006, 199-281). Crucially, the definitions of relevant property include pensions, although valuing them can be difficult (Martel 2003; Law Commission of Ontario 2008).[16] The division of property between spouses reflects a legislative commitment to the idea that, whatever their role in the specialization of labour, spouses contribute equally to the marriage, which is viewed, unromantically, as a joint economic enterprise. It follows from this view that the spouses appropriately share its fruits. Indeed, legislation refers to "spouses," without distinguishing husbands from wives, although provincial legislatures sought to remedy the injustice suffered by women who, on marriage's end, faced economic precariousness. In crafting the rights and duties of married spouses, legislatures faced policy choices concerning the use of obligatory rules as opposed to rules the parties can alter by contract. These choices have resulted in an important distinction between common-law provinces, where spouses, by contract, may alter the rules of matrimonial property that apply to them,[17] and Quebec, where spouses cannot exempt themselves from the rules of the family patrimony implemented in 1989.[18] Both the common-law and civil-law regimes, however, recognize the importance of the matrimonial home, and it is possible, pending dissolution of the union, for one spouse to obtain an order for occupancy (Conway and Girard 2005; Pineau and Pratte 2006, 310-11).[19]

What is striking is that, simultaneously with the enactment of these rules on matrimonial property, the rate of marriage has declined. Throughout the 1960s, more than nine women out of ten would marry over the course of their life; by 2000, only 60 percent of women (and less than 40 percent of those in Quebec) were expected to marry at least once (Le Bourdais and Lapierre-Adamcyk 2004, 930). Thus, the proportion of adult unions affected by these rules on relationship breakdown has diminished significantly.[20]

Distinct from provincial regulation of spouses' property, the federal *Divorce Act* addresses spousal support, authorizing a court to make an order that it thinks "reasonable" for support of the other spouse.[21] This discretion makes plain that, unlike the presumption of equal division of property, spousal support does not operate as of right. A spouse who claims support from the other must demonstrate entitlement to support as well as the appropriateness of the amount sought. Parliament listed three factors that judges must consider when exercising their discretion: the length of time the spouses cohabited, the functions performed by each during cohabitation and any order or agreement relating to support.[22] Moreover, a spousal support order should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, apportion between the spouses any financial consequences arising from child care that are not addressed by child support, relieve any economic hardship of the spouses arising from the breakdown of the marriage and, insofar as is practicable, promote each spouse's economic self-sufficiency within a reasonable time.

The broad outlines of the federal legislation require judges to fill in the details of the Canadian law of spousal support. Beyond the vague reference to "reasonable" support, the legislation can be understood as reflecting several models of marriage and understandings of the basis of the obligation (Leckey 2002). Case law thus plays an especially large role. Moreover, while the legislative text has remained unchanged, the case law has changed significantly as the Supreme Court of Canada emphasizes one aspect of support, then another (Rogerson 2004). In 1992, in its landmark judgment in *Moge v. Moge*,[23] the Court

ordered support to a former wife who, though nearly 20 years had passed since the couple had separated, was still unable to support herself. The Court held that no single factor or objective takes priority – that is, in appropriate circumstances, the need to promote the parties' self-sufficiency did not rule out long-term support. The judges held that the *Divorce Act* requires a fair and equitable distribution of resources to alleviate the economic consequences of the marriage or of its breakdown. In particular, the Court underscored the importance of spousal support for compensating a spouse for losses connected to the marriage.

In 2001, in response to concerns about the uncertainty in the law of spousal support, the Department of Justice asked two specialists in family law, Rollie Thompson and Carol Rogerson, to develop Spousal Support Advisory Guidelines. The guidelines do not have the force of law; rather, they are intended as a starting point for negotiations by spouses and their lawyers and for judges. The intention was that the guidelines would reflect the existing law, rather than change it.[24]

Spouses typically negotiate a global settlement, dealing simultaneously with child custody, property division and spousal support. Such negotiations, however, may disadvantage women: in exchange for concessions they see as benefiting the children, women may concede their economic entitlements (Martin 1998).

Indeed, despite the concern for equality in the distributive rules of family law, recently divorced or separated mothers remain financially worse off than recently divorced or separated fathers. As table 2 shows, 44 percent of recently divorced or separated mothers have an annual personal income of less than $30,000, contrasted with 19 percent of recently divorced or separated fathers. Moreover, 28 percent of recently divorced or separated mothers have an annual household income of less than $30,000, compared with 12 percent of recently divorced or separated fathers. Further, as table 3 shows, there is a high incidence of low income for families with children headed by a single female parent. Despite improvements over the past 20 years, the economic disadvantage of single-parent families headed by women has persisted. The causes are doubtless complex, and the picture necessarily must take into account the rules on the support of children (discussed in a later section). Before taking up that matter, however, it is appropriate to consider problems raised by the contemporary pluralism of Canadian families, which has effects both within marriage and beyond.

Table 2
Annual Personal and Household Income of Recently Divorced or Separated Fathers and Mothers,[1] Canada, 2006 (Percent)

	Recently divorced or separated fathers	Recently divorced or separated mothers
Annual personal income		
< $30,000	19	44
$30,000-$59,999	29	30
> $60,000	37	11
Not stated or unknown	15	16
Total	**100**	**100**
Annual household income		
< $30,000	12	28
$30,000-$59,999	26	31
> $60,000	49	23
Not stated or unknown	13	19
Total	**100**	**100**

Source: Lochhead and Tipper (2008, 9).
[1] Divorced from a marital or common-law union between 2001 and 2006.

Table 3
Incidence of Low Income,[1] by Family Structure and Presence of Children, Canada, 1985 and 2000 (Percent)

	Family structure			
	Couple families		Female lone-parent families	
Presence and age of children	1985[2]	2000	1985[2]	2000
All families	10.3	9.1	45.1	35.1
No children	8.6	8.3	–	–
Children aged under 6 years only	13.9	12.6	69.2	54.1
Children aged 6-17 years only	10.6	9.8	50.5	40.9
Children 0-17 years	15.9	14.6	76.1	65.6

Sources: Rachid (1989, table 11); Statistics Canada (2003).
[1] Refers to the position of an economic family or an unattached individual 15 years of age and over in relation to Statistics Canada's low-income cut-offs.
[2] Excluding Yukon, Northwest Territories and Aboriginal reserves.

The intersection of religious and civil marriage law

So far, the study has treated marriage primarily from the perspective of state law, viewing marriage as a civil institution. This section, however, addresses sources of friction between religious family practices and state regimes by looking at the issues of religious dispute resolution in the family setting and polygamy.[25]

To what extent should legislatures and policymakers care about the influence and use of religious norms as family members attempt to resolve disputes? Recent public debate has focused on recourse to religious, notably Muslim, norms and on the use of religious arbitral forums. The suitability of religious norms and forums, however, must be contextualized in relation to the scope for private ordering in family matters more generally.

Provincial and federal regimes present considerable scope for parties to negotiate and conclude agreements that depart from the legislated default rules (Roy 2006a; Tétrault 2007b).[26] Where children are concerned, other rules apply, and courts assume a greater supervisory role. There is also significant scope in some provinces for alternative dispute resolution outside courts, through mediation and arbitration.[27] Use of these possibilities by Christians on the ostensibly "secular" ground of individual choice typically attracts little media or other attention, even if one spouse receives a distribution that is less than she would have obtained under the default rules of the state regime or in a court.

By contrast, recourse to rules deriving from Islamic sources and arbitration in a religious forum have caused much more controversy (Macklin 2005; Ryder 2008, 104-6). In reaction to public outrage over the possibility of so-called *sharia* courts, Ontario amended its law in 2006 so as to specify that family arbitrations may be conducted only in accordance with the law of Ontario or of another Canadian jurisdiction (Razack 2007; Weinrib 2008).[28] Some scholars have rightly expressed concern that rules prohibiting the recourse to religious norms or the use of religious arbitral forums are likelier to drive practices underground than they are to eradicate them (Macdonald and Popovici 2007; Shachar 2008). Moreover, while religious arbitration may have no legal force in Ontario, mediation remains a viable method for couples intent on using religiously based dispute resolution mechanisms. The mediation option suggests that "nothing has fundamentally changed for Muslim women whose vulnerability to bad faith husbands and patriarchal imams was the central concern of opponents to Sharia arbitration" (Emon 2009, 420). The shift underground of practices following such a legal reform is notoriously difficult to track and calls for careful empirical inquiry.

While the ways in which religious practices may adapt to law reforms is a concern, the larger point is that a focus on religious norms and arbitration in the resolution of family disputes risks exaggerating the distinctiveness of religion for family policy. In fact, divorcing spouses may exact and receive less than their statutory entitlement for a host of reasons, some of which rightly may engage public policy. The hostile reaction to the idea of religious arbitration in Ontario seemed, however, without conclusive evidence, to take religious norms as the most pressing reason a divorcing woman might claim and receive less than her fair share of household resources. Moreover, criticisms of religious arbitration forums unfolded against an unfounded assumption that the civil courts are easily accessible and affordable for family justice; in reality, many barriers prevent individuals – be they Muslims, Jews, members of another religion or nonbelievers – from going to court to enforce their rights (Macdonald 2003). For family policy, the pressing issue is the access of vulnerable individuals, especially women, to information and other support services as they undergo relationship breakdown. These needs transcend enculturation in one religious tradition or another.

The second point of friction at the intersection of religious marriage and state law relevant for present purposes is polygamy. The practice of polygamy poses difficult policy questions in fields such as criminal law, family law, immigration, taxation and social policy (see, for example, Bailey et al. 2005; Campbell 2005). Separating the strands in reference to this paper's key oppositions helps clarify the issues for debate, although it is only a preliminary step.

In the public-law terms of the criminal law, practising "any form of polygamy" or entering into "any kind of conjugal union with more than one person at the same time" remains an offence punishable by up to five years in prison.[29] The charges recently laid in Bountiful, British Columbia, likely will lead to a testing of this criminal prohibition against the guarantee of religious freedom in section 2(a) of the Charter (Meissner 2009). Turning to private law, with an instrumental focus on the distribution of resources among family members, the drafters of family law

must consider whether to enforce support duties arising from a polygamous marriage validly celebrated abroad. For example, Ontario's *Family Law Act* includes, in its definition of "spouse," a marriage that is actually or potentially polygamous if valid where it was celebrated.[10] An individual in such a polygamous marriage could seek an order in Ontario for support from another "spouse." Distinct from this distributive question, another private-law matter engages family law's symbolic dimension: should the federal definition include polygamous unions as civil marriages? What, if anything, does the recognition of same-sex marriages entail for polygamous unions (Leckey 2007b; Galloway and Matas 2009)?

Additional instrumental considerations play out in public-law fields such as immigration, taxation and welfare policy. The immigration problem includes whether rules relating to sponsorship and family reunification should take into account the bonds of foreign polygamous marriages. Taxation and social policy issues include the extent to which the rules defining tax credits and entitlements should take into account polygamous marriages. What is the appropriate posture in relation to a religious polygamous marriage of a state regime that confers a benefit on a contributor's surviving married or common-law spouse? The example of Bountiful shows that at least some people in Canada practise polygamy. This fact should prompt policymakers to consider the extent to which their role is to respond to existing family practices as opposed to directing them.

This brief overview of some frictions between civil and religious marriage law sets the stage for discussion of another kind of pluralism – that of adult relationships outside marriage. The connection is that, in both cases, difficulties can arise from a policy focus that takes the civil marriage regime as paradigmatic.

Other Adult Relationships

As table 4 shows, married-couple families remain the most common family structure, constituting 68.6 percent of all families in the 2006 census (down from 70.5 percent five years earlier). Within the set of married-couple families, the largest family structure is that of married couples with children ages 24 and under, representing 34.6 percent of total census families (Milan, Vézina, and Wells 2007, 11). Collectively, however, Canadian families are more plural in form than they were several decades ago. The census in 2006 for the first time enumerated more unmarried people ages 15 and over (51.5 percent) than legally married people; 20 years earlier, 38.6 percent of the population ages 15 and over was unmarried (Milan, Vézina, and Wells 2007, 19). How do these forms of family outside traditional marriage fit into the landscape of family law?

In 2001, the Law Commission of Canada collected four legal models used for regulating adult personal relationships: marriage, private law, ascription and registration (xvi). Box 1 summarizes them.

New kinds of couples

With reliance, in varying measures, on the models of marriage, ascription and registration, Canadian family law in recent decades has gradually recognized two new kinds of couples beyond the traditional, married, opposite-sex couple.[11] One is the unmarried, cohabiting, opposite-sex couple,[12] known in Quebec as the de facto union. The other is the same-sex couple.[13] The legal recognition of these types of couples is the product of judicial and legislative activity. Together, their stories show more concretely the promise and risks of the four legal models. They also provide revealing case studies of the movement and tension between dimensions of family law: public law and private law, instrumental and symbolic, and formal and functional. These

Table 4
Change in Family Structure, Canada, 2001 to 2006

Family structure	2001		2006		Change, 2001–06
	(*N*)	(%)	(*N*)	(%)	(%)
Total	8,371,020	100.0	8,896,840	100.0	6.3
Couple families	7,059,830	84.3	7,482,775	84.1	6.0
Married	5,901,420	70.5	6,105,910	68.6	3.5
Common-law	1,158,410	13.8	1,376,865	15.5	18.9
Lone-parent families	1,311,190	15.7	1,414,060	15.9	7.8
Female parent	1,065,360	12.7	1,132,290	12.7	6.3
Male parent	245,825	2.9	281,775	3.2	14.6

Source: Milan, Vézina, and Wells (2007, 8).

Box 1
Legal Models for Regulating Adult Relationships in Canada

Marriage is a status into which two partners enter by their consent in a formal ceremony. Laws attach to marriage many legal effects, including a duty of mutual support. Some of these effects are obligatory and some can be displaced by mutual agreement. Only the death of a spouse or a judgment of dissolution terminates marriage. Federal and provincial laws set out rules relating to spouses' economic obligations to each other on dissolution.

The private-law model consists of the use of instruments such as contracts and wills. Such legal forms are instrumentally useful for bringing about new distributions of rights and duties. For example, two adults living together may agree by contract to apply to themselves the rules of property sharing applicable to married couples in their province of residence. Or they may draft wills, naming each other as chief beneficiary. The instruments and doctrines of private law do not bind third parties or governments. From a public policy perspective, they are typically invisible.

The private-law model presumes that the parties to an adult intimate relationship know their position under the general private law of obligations and property and that they might decide that their relationship warrants a consensual alteration of that position. By definition, the private-law model operates in a formal way.[1] It functions best where the parties are relatively equal in knowledge and power and have the resources to obtain legal advice. Private ordering is most effective at formalizing expectations that are conscious and articulable. Like the marriage model, the private-law model can be viewed as consistent with individual autonomy. Where the conditions of access to resources and equality are not present, however, the risk of a weaker party's vulnerability counters the benefits in terms of autonomy. A difficulty with private ordering in the family setting is that the ordinary rules of contract may prove less adaptable than legislated family regimes. For example, legislated regimes provide a means to vary support obligations where circumstances have changed, whereas a private agreement to pay support may not have provided a way to respond to changes.[2]

Ascription refers to a legislature's instrumental attachment of rights and duties on the basis of particular relationships. These rights and duties may be interpersonal ones falling within the private law or they may be ones connecting individuals to the government. For example, statutes in the common-law provinces ascribe a duty of mutual support to couples living together longer than a designated period. By designing a package of rights and duties, a legislature saves the parties the trouble of devising their rights and duties from scratch. Like marriage and registration, ascription can operate well by making explicit expectations that might be tacit and inarticulate during the relationship. In this respect, it contrasts with the private-law model.

Often the legislator takes one feature as indicating the presence of a given policy concern. Thus, some regimes take cohabiting in a conjugal relationship for three years as a proxy for the commitment and interdependence associated with marriage. A drawback of ascription is that the feature used to identify relevant relationships is likely both under- and overinclusive. That is, the criterion likely both fails to capture all relationships engaging the policy concern and captures some that do not actually do so.

Ascription may reflect an assumption that the obligations imposed match the tacit expectations of most people in such relationships. Alternatively, it may reflect an assumption that the appetite for formal commitment to the relationship is asymmetrical: one party wishes to commit more deeply, and the other, perhaps better endowed with resources, refuses (Leckey 2008, 131-2).

As the Law Commission of Canada notes (2001, xvi), ascription infringes on autonomy in the sense that it can attach obligations without people's consent or even awareness. The model includes design choices regarding not only the content of the rights and duties, but also their force. Whatever their content, the rights and duties ascribed to individuals may be obligatory or they may be subject to opting out or consensual alteration. Opting out or contractual alteration is most appropriate where the justification for ascription is that it matches the parties' unspoken expectations. By opting out or altering their relation by contract, parties signal that the ascription regime did not mirror their expectations. Where concern is that the parties are unequal in resources and power, obligatory rights and duties may seem more appropriate.

Registration refers to a legislatively established framework of rights and obligations that the parties to a relationship can take on. As with marriage and ascription, the rights and duties may operate within the private law, the public law or both. Like marriage and ascription, registration presents design choices relating to the content of the rights and duties and as to their obligatory or alterable character. The content of a registration regime may track the legal content of marriage, but it need not. Like marriage and ascription, the registration model saves the parties the trouble of defining their rights and duties from scratch. Like marriage and the private-law model, it operates on a formal, consensual basis and is consistent with individual autonomy. It is further like those models in relying on the parties' awareness of how laws will treat their relationship if they do not take any legal steps to alter that treatment. And like them, it is ineffective where the parties are markedly unequal in resources and influence. It may provide a constructive model for parties for whom a civil marriage is objectionable. Moreover, it may be politically feasible to include a class of intimate relationships within a registration regime when bringing them within the definition of marriage would be less so. In addition to its instrumental content, a registration model may, to varying degrees, have a symbolic dimension of state validation.

[1] One exception that uses private law but departs from the formality associated with contract and wills is the retrospective claim in unjust enrichment.
[2] *C.R. v. J.B.*, [2005] R.J.Q. 1391, 2005 QCCA 547.

examples of family law pluralism also connect with the political ideals of formal and substantive equality, measured within individual couples and from one group of couples to another.

The discussion develops across three subsections. The first two address, respectively, unmarried couples and same-sex couples. The third makes explicit the grip of the past in the underlying assumption of marriage as the paradigmatic adult relationship.

Unmarried couples

From the 2001 census to that in 2006, the number of unmarried-couple families grew by nearly one-fifth (18.9 percent), a rate more than five times faster than that for married-couple families (see table 4). In 2001, unmarried-couple families accounted for 13.8 percent of all census families; by 2006, they were 15.5 percent. Two decades ago, however, they accounted for only 7.2 percent of all census families (Milan, Vézina, and Wells 2007, 9). This sustained increase in the incidence of unmarried couples hints that they might present a matter for further attention by policy-makers. Indeed, as table 5 shows, unmarried cohabitants have a much higher probability of union disruption than do married couples.

Most provincial legislatures have used the ascription model for unmarried couples. In the common-law provinces, legislation requires unmarried cohabitants to support each another; the duty persists after cohabitation ends.[14] As evidenced by legislative debates, the objective in most instances was not primarily to recognize the intrinsic worth of unmarried cohabitants as an identity group or to affirm their equality to married couples, but, instrumentally, to palliate the vulnerability of women who had lived with men with a view to reducing claims to public assistance.[15]

Although this policy choice has been widely adopted, analogizing unmarried and married couples for the assignment of duties can cause difficulties and surprises. Unlike married spouses, unmarried cohabitants have no formal marker of their relationship; legislatures wishing to regulate them thus need a proxy for their commitment. A typical choice is continuous cohabitation for a given period, such as three years. An alternative basis may be living "in a relationship of some permanence" and having a child together.[16] A criterion of cohabitation for a specified period, however, is more likely to cause disputes over evidence than a criterion of marriage or registration. On the breakdown of the relationship, members of an unmarried couple may disagree on when they really began living together and, thus, whether they crossed the statutory threshold.

Another surprise can come when the partners stop living together. Marriage brings a legal status that persists even when the spouses have separated; the legal bond of marriage survives until dissolved by the death of one spouse or by a divorce judgment. By contrast, a cohabitation relationship, which is recognized on a functional basis, does not survive in a comparable way the physical separation of the parties and the intention of one of them that it should end. Thus, by terminating a cohabitation relationship, an individual loses his or her claim, for instance, to a survivor's pension under the Canada Pension Plan on the partner's death. In other words, government programs treat a former common-law partner like a divorced spouse, not like a separated married spouse.[17]

Alone among the provinces, Alberta has used the ascription model to attribute support obligations to a set of relationships larger than conjugal cohabitants. That province's scheme of "adult interdependent relationships," adopted in 2002, includes relationships outside marriage in which two persons share each other's lives, are emotionally committed to each other and function as an economic and domestic unit. There is no sexual requirement.[18] Alberta designed this scheme so as to comply with its constitutional obligations regarding same-sex couples arising from a legal case known as *M. v. H.*[19] After the judgment in that case, the provincial government resisted elevating same-sex couples alone to a position equal to that of opposite-sex cohabitants (Alberta Law Reform Institute 2002), which suggests that, in its view, the instrumental extension of rights and duties to gay and lesbian couples on a functional basis risked validating them. Consequently, the government drafted a more widely cast regime that includes not only same-sex cohabitants, but also some nonconjugal couples who live together, such as two friends. The regime has the advantage of loosening the

Table 5
Relative Risk of Family Disruption, by Type of Union, Quebec and Rest of Canada,[1] 1995

Type of union	Quebec	Rest of Canada
Direct marriage	1.45	1.00
Marriage following cohabitation	1.46	1.66
Cohabitation	3.47	4.94

Source: Le Bourdais and Lapierre-Adamcyk (2004, 937).
Note: The coefficients represent the relative risk of family breakdown among intact families after controlling for the effect of various sociodemographic characteristics of the mother.
[1] Place of residence at birth of first child.

legislative grip on conjugality as the key indicator of legally relevant relationships (Cossman and Ryder 2001), but it also risks surprising individuals who do not see themselves as tacitly assuming obligations toward a person with whom they live (Bala 2003, 90-3). Because the scheme is relatively recent, its wider impact remains to be seen.

On the question of spousal support for unmarried couples, Quebec provides a glaring contrast. As in the other provinces, public-law legislation enacting social programs in Quebec, such as workers' compensation, treats de facto spouses similarly to married spouses in most respects (Tétrault 2005, 549-51) – that is, for instrumental purposes, the public law of the family recognizes unmarried couples on a functional basis. Under the private law, by contrast, de facto spouses, as such, owe each other nothing (Moore 2003, 76-86) – in lawyerly jargon, they are legal strangers one to another. This state of affairs reflects a legislative choice to confine the family regulation within the Civil Code almost entirely to those relationships recognized by formal means. The result is that, in Quebec more than in any other province, the set of family relationships recognized by the private law for instrumental purposes is identical to the set recognized for symbolic purposes.

The Civil Code's silence regarding the duties of de facto spouses is especially striking given the prevalence of unmarried cohabitation in Quebec.[40] According to the 2006 census, unmarried couples represented over one-third (34.6 percent) of all couples in the province, a much higher proportion than in the other provinces and territories (13.4 percent).[41] The increase in the incidence of unmarried couples in Quebec from 2001 to 2006 was 20.3 percent (Milan, Vézina, and Wells 2007, 35). As table 5 shows, the relationships of unmarried couples in Quebec appear to be somewhat more stable than those of unmarried couples elsewhere in Canada, but the likelihood of the disruption of such relationships is still three and a half times higher than for married couples elsewhere in Canada.

Matrimonial property provides a contrast with the support regimes in force in all provinces but Quebec. Most provinces restrict their matrimonial-property regimes to married couples and, typically, no rules call for the sharing of assets when cohabitation ends. In the late 1990s, a former cohabitant in Nova Scotia challenged the constitutionality of her province's exclusion of unmarried couples from its matrimonial-property regime and won her case in the provincial court of appeal. Following that judgment, the legislatures of Manitoba and Saskatchewan amended their statutes so as to include unmarried couples in their matrimonial-property regimes.[42] On further appeal, however, the Supreme Court of Canada reversed the holding that restricting the regime of matrimonial property to married couples discriminated against unmarried couples. In 2002, in *Nova Scotia (Attorney General) v. Walsh*,[43] it upheld the distinction on the basis that only married couples had chosen to subject themselves to the onerous rules of property division. The class of unmarried cohabitants, held the majority of the Court, was diverse and it was impossible to presume their consent to the regime.

Consequently, unless they have made arrangements by contract, unmarried cohabitants have relatively little protection in property matters. They may make a claim under the general private law, however, and have had modest success in claims of unjust enrichment (Lefrançois 2005, 51-5; Payne and Payne 2006, 60-1).[44] Such claims require case-by-case demonstration of three elements: impoverishment on the part of the claimant, a corresponding enrichment on the part of the respondent and an absence of juristic reason, such as a contract, for the wealth transfer. Claims in unjust enrichment are most useful where one partner has contributed tangibly to significant property owned by the other. Overall, however, the recourse to claims of unjust enrichment is far from a full substitute for the equalization of family property or partition of the family patrimony available to married spouses.

In addition to the use of the ascription model, several provinces provide registration options for partners who do not wish to marry or cannot do so. Registration schemes for domestic partnerships have been available since 2000 in Nova Scotia and since 2002 in Manitoba (Roy 2002b).[45] Alberta's regime, noted earlier as an instance of the ascription model, also has a registration component: two adults, including those who are related by birth or adoption, may enter into an adult interdependent partnership agreement and thus may invoke the provisions that would apply by ascription to couples who satisfy the statutory criteria.

Quebec enacted its own alternative to marriage, the civil union, in 2002.[46] It is more than simply a registration scheme, however; drawing on the symbolic affirmation associated with marriage, the Civil Code refers to a civil union's "solemnization" (Kasirer 2003). It is available to both same-sex and opposite-sex partners,

and its rules incorporate the legal regime of marriage, including the obligatory rules of the family patrimony.[47] Unlike marriage, however, which requires a divorce judgment, a civil union can be consensually dissolved by a notarized joint declaration by the spouses.[48]

Same-sex couples

At the time they were introduced, the registration schemes just noted provided a formal recognition option for same-sex couples who, under federal law, could not yet marry (Moore 2002b; Fisher et al. 2004). Now, same-sex couples are recognized within Canadian family law on footing identical to that for opposite-sex couples. As recently as 1995, however, in *Egan v. Canada*,[49] the Supreme Court of Canada rejected a claim that Old Age Security, a distributive program structured by public law, discriminated unjustifiably on the basis of sexual orientation by excluding same-sex couples.

In contrast, the first major Charter success before the Supreme Court relating to recognition of same-sex relationships concerned the private law of the family. In *M. v. H.*,[50] the Court heard a claim of a former member of a lesbian cohabiting couple that it was sexual-orientation discrimination, contrary to section 15 of the Charter, for Ontario to ascribe a spousal-support regime to unmarried, opposite-sex couples while ascribing no such regime to unmarried, *same*-sex couples. The regime to which the claimant sought access reflected an instrumental goal of addressing women's economic vulnerability so as to reduce demands on the public purse. The claimant contended that, where the legislature recognized unmarried, opposite-sex couples on a functional basis, it should recognize same-sex couples on the same basis. The other woman opposed the claim, resisting the retroactive characterization of their relationship, on a functional basis, as marriage-like.

The Court agreed with the claimant. It referred to family law's instrumental and symbolic roles, and acknowledged that its judgment would reduce the claims on public resources by former members of same-sex couples. But, consistent with its case law on section 15 of the Charter,[51] it framed its judgment as a glowing, symbolic validation of same-sex couples' worth and commitment (Cossman 2002a,b). Combining different bases for regulating family in an arguably problematic way, the Court used the language of dignity and recognition more typically associated with formal, consensual bases for regulation, such as marriage, than with the functional basis of ascription. In the Court's view, ascribing duties to unmarried couples without their consent upheld their dignity and enhanced their self-worth.

In response to *M. v. H.*, Parliament and provincial legislatures brought their regimes in line with the Court's holding that distinctions between unmarried couples on the basis of sexual orientation were unconstitutional (Cossman and Ryder 1999).[52] Ontario, for instance, added a new category, "same-sex partner," to its *Family Law Act*.[53] Quebec replaced gendered definitions for couples in more than two dozen statutes with a gender-neutral definition of de facto union.[54] Consequently, where spousal-support regimes attach to opposite-sex couples who live together, they also attach to same-sex couples who do so. The different forms of the legislative responses to *M. v. H.* – including Alberta's innovation detailed above – show awareness that even the instrumental recognition of same-sex couples on a functional basis had symbolic resonance.

Several years later, the focus of advocacy shifted to marriage, with the next generation of claims squarely targeting the state's symbolic affirmation in the formal institution of marriage. Thus, recognition of same-sex couples as family for instrumental purposes in *M. v. H.* paved the way for their symbolic recognition (Leckey 2007d). Lawsuits in a number of provinces led to declarations that the opposite-sex requirement for marriage violated the Charter on the basis of sexual orientation.[55] Parliament eventually passed legislation making it possible across the country for same-sex couples to marry civilly.[56] Canada's recognition of same-sex couples has put it, along with countries such as the Netherlands, Spain and South Africa, at the cutting edge of family developments (Wright 2006; Bamforth 2007).

From a policy perspective, same-sex couples may have merged onto the general terrain of family law, but viewed in the light of the impact of same-sex marriage on public discourse, their numbers are not high, representing 0.6 percent of all couples in the 2006 census.[57] Married same-sex couples, who amounted to 16.5 percent of all same-sex couples in 2006 (Milan, Vézina, and Wells 2007, 12), have the benefit and burden of spousal support and division of matrimonial property. Unmarried same-sex couples fall under whatever legislative regime operates in their home province.

With the adoption of these instrumental and symbolic forms of recognition, it might be that sexual orientation is no longer a salient criterion for identifying policy challenges. The financial vulnerability of a

same-sex partner after a long relationship with a specialization of labour may be the same as that of an opposite-sex spouse.[58] Indeed, although one might suppose that same-sex relationships escape the negative effects for women associated with opposite-sex marriage, sociological inquiry shows that, over time, many same-sex couples assume a specialization of labour similar to that of opposite-sex spouses, one that is reflected in different earnings (Carrington 1999). Moreover, lesbian couples might be expected to exacerbate the impact of women's lower earnings relative to men's: female same-sex couples might bear the brunt of a gendered labour market, with neither partner appearing in the better-paid category.

Form, function and the enduring focus on marriage

While the legal situation of same-sex relationships seems to have stabilized, the position of unmarried couples in Quebec has recently made headlines. As noted in the introduction, in January 2009 a trial took place in Montreal of a former de facto spouse who sought inclusion in federal and provincial marriage laws (Peritz 2009). With a view to receiving $50 million of her former partner's assets and $56,000 per month in alimony (distinct from the child support she receives from her former partner for their children), she made three constitutional claims. First, it was unconstitutional for the Civil Code's spousal-support regime not to include de facto unions. Second, it was unconstitutional for the Civil Code's family patrimony rules not to extend to de facto unions. This claim appears contrary to the Supreme Court of Canada's judgment in *Walsh*,[59] although the legal context differs from that present in that Nova Scotia case (Leckey 2009a). These two claims required the court to find that it is discriminatory to apply an instrumental family policy to couples recognized formally but not to couples recognized functionally. The third claim was that it was unconstitutional for Parliament's *Civil Marriage Act* not to include, as married, partners who have lived together for three years. This claim engaged the symbolic affirmation associated with marital status, attacking the constitutionality of a status secured by exclusively formal means.

Given the resources available to both parties, and in particular the stated intent of the claimant's lawyer to change family law, the case is unlikely to be settled for some time. But this lawsuit unfolds against a larger backdrop, and provides an occasion for reflecting on the appropriate treatment by lawmakers and policy-makers of relationships outside traditional marriage. In recent years, a number of scholars have called for revision of the legal position of unmarried couples in Quebec (Jarry 2008). Others, emphasizing liberty and choice, protest the illegitimacy of imposing duties on individuals without their consent (Roy 2002a, 883; Mrozek 2009). What issues should be borne in mind for policy reflection?

A significant factor is the impact of the existing rules on children. A focus on the choice or autonomy of adults allows little space in which to discuss the effect of parents' marital status on their children. In determining the duties of parents to their children, Canadian legislatures do not distinguish married from unmarried parents, as we will see in a later section. Yet, in most provinces, the legal treatment of unmarried cohabitation does result in disadvantages for children whose parents are not married. The protections of marriage – chief among them the possibility of one spouse securing exclusive possession of the matrimonial home – indirectly benefit the children of married parents over those of unmarried parents.[60]

How many children are affected? In Canada, the proportion of married couples with children ages 24 and under far exceeds that of unmarried couples with children those ages (34.6 percent versus 6.8 percent). Nevertheless, significant numbers of children are raised in unmarried-couple families: according to the 2006 census, of all children ages 14 and under living in private households, 14.6 percent lived with parents in a common-law union, more than triple the proportion of two decades earlier (Milan, Vézina, and Wells 2007, 11, 24). Concerns about the effects of parents' unmarried cohabitation on their children are increasingly raised in Quebec (Goubau, Otis, and Robitaille 2003), where, by 2005, births outside marriage reached nearly 60 percent, up from approximately 10 percent in 1978 and less than 5 percent in 1951 (Le Bourdais and Lapierre-Adamcyk 2008, 85). Some Quebec judges have creatively conferred use of the matrimonial home on one de facto spouse on the basis of the children's interests.[61] Such orders show a judicial refusal to accept that the legislature's preference for recognizing relationships on a formal basis should confine the scope for instrumental effects where children are involved. Still, it would be preferable for provincial legislatures to debate the matter and to regularize such a possibility (Tétrault 2008, 337).

Another factor is the privileged place of marriage as a point of reference. Indeed, the legal treatment of unmarried couples and same-sex couples has remained closely tied to the regulation of marriage,

despite Canadian family law's distinction as a front-runner in recognizing the so-called functional family (Bala 1994; Millbank 2008b). Paradoxically, the response to the fact of greater pluralism in family form has been to treat more couples like married spouses (and more adults like parents). Yet the foundational category of marriage has passed largely unexamined (Polikoff 2008), though it remains the touchstone by which recognition of other relationships is measured and designed. Claims under the equality guarantee in the Charter, in fact, have solidified this approach, arguing that one group (unmarried couples, same-sex couples) is really the same as another group (married couples) and that governments should treat them as such. The policy question is typically framed in terms of a relationship's assimilation into marriage, either total (in the case of same-sex couples) or partial (in the case of unmarried cohabitants, for support but not for property). This approach, which Bottomley and Wong call a "logic of semblance" (2006, 42), allows little space in which to examine the needs and vulnerabilities flowing from a particular kind of relationship, viewed without reference to marriage.

The idea of treating additional categories of relationship partly or wholly like marriage has some negative effects on thinking about family, since features of the marriage model can be obstacles to identifying other relationships. More specifically, the privileged place of marriage as point of departure for policy analysis imposes three constraints on analysis. One constraint is conjugality: a focus on sexual intimacy makes it harder for policy-makers to assess nonconjugal relationships, such as, for instance, that of cohabiting siblings, for possible recognition as a family unit (Law Commission of Canada 2001).[62] Policy analysis of cohabiting siblings or friends necessarily would separate the dimensions of public and private law as well as instrumental and symbolic purposes. In that case, concern for autonomy might well dictate that registration, as opposed to ascription, is most appropriate. And it might be that interpersonal duties and recognition by public programs – such as survivors' benefits and tax exemptions for transfers of registered savings – matter more than a symbolic recognition.[63]

A second constraint the marriage model imposes on thinking about family policy is cohabitation. Researchers are just beginning to focus on couples "living together apart" – that is, partners who regard themselves as committed to each other but do not share a dwelling (Haskey and Lewis 2006). Still, even the most creative policy thinking about relationships often assumes cohabitation as an essential criterion. Douglas, Pearce and Woodward challenge this assumption, arguing that, if "function" is the basis of the claim for legal recognition, there is no adequate basis for excluding noncohabiting partners from protection: "confining a remedial jurisdiction to those living together re-imposes a type of 'form' as the qualifier for inclusion, creating a new 'status' of cohabitation and bringing us back to where we started" (2009, 29).

A third constraining feature of the marriage model is its all-or-nothing character, since its full legal effects attach immediately on celebration. Proxies for the commitment of marriage typically copy this on/off character – an unmarried couple either qualify for assimilation into the spousal-support regime applicable to married couples or they do not. Where the legislature has set a threshold of three years' cohabitation, couples having lived together for a shorter time are invisible for legal purposes,[64] while couples who cross the three-year threshold come suddenly into view. Yet a less blunt, more incremental approach might better advance the policy objectives associated with unmarried couples. Barlow and James (2004) argue that the commitment and economic reliance of unmarried couples deepens over time; it thus might be more appropriate for legislatures to ascribe duties incrementally, with increasing weight at several intervals or with the arrival of children. More sophisticated policy solutions might come from empirical study of the lives of unmarried couples, as Lewers, Rhoades and Swain (2007) suggest. Unlike the equality claim in *Walsh* or the 2009 challenge by the Montreal woman, such an approach would not take the form of a constitutional claim for access to marriage by unmarried couples seen as a single group.

Policy analysis also must take account of the diversity of unmarried couples. In 2006, common-law unions were more predominant, in absolute numbers, among individuals ages 25 to 29, although the most rapid growth of this form of family life between 2001 and 2006 occurred in older age groups, with the number of individuals ages 60 to 64 in unmarried, cohabiting couples rising by 77.1 percent (Milan, Vézina, and Wells 2007, 20-1). These two groups likely have very different needs, concerns and goals in not getting married. Some feminists also express caution about assuming that treating unmarried couples like married ones will produce an overall improvement in the situation of women (Bottomley and Wong 2006).

Rigorous attention to the different roles of family law and its private and public aspects is necessary for

understanding the logic of reform and for avoiding perverse policy consequences. The strategic shifts evident in past advocacy for same-sex couples are revealing. When the objective was access to a regime of ascription, advocates advanced concern about addressing the economic vulnerability resulting from intimate relationships, and focused on the need to palliate, *ex post*, the fallout of reliance and investment in such relationships. They argued that the interests of the economically weaker members of same-sex couples aligned with those of the economically weaker members of unmarried, opposite-sex couples, who might not have had a meaningful choice about the status of their relationship. Once the Supreme Court of Canada required the inclusion of same-sex couples within the class of unmarried couples for support purposes, however, the discourse of gay advocacy shifted. Now, the objective became marriage, and advocates for same-sex rights took up the liberal language of choice consistent with an intentional, formal model of regulation, framing the push for same-sex marriage as a quest for the right to choose to marry, focusing on formal recognition resulting from an *ex ante* choice (Osterlund 2009). That divergence between same-sex couples and unmarried opposite-sex couples shows that those seeking equality under the Charter may not always share common interests (Leckey 2007a, 82-3).

The experience of same-sex couples invites caution on the part of policy-makers in redesigning private and public programs in response to equality claims. Following the federal amendments, individuals living with same-sex partners may have been surprised to learn that they were suddenly "spouses" for the purposes of various redistributive programs. Lahey (2001) shows that extending spousal treatment to lesbian and gay couples for federal income taxation, social assistance and retirement programs resulted in disproportionately higher taxes and reduced social benefits for those lesbian and gay couples with the lowest incomes. Thus, the net impact of the recognition that same-sex couples "achieved" may have been regressive in the sense of disadvantaging lower-income couples and benefiting higher-income ones (Young and Boyd 2006). To some extent, therefore, it appears problematic to justify, on the symbolic grounds of equal recognition, the application of redistributive rules to same-sex couples on a functional basis.

The larger point is that it is worth analyzing claims for changes to family law rigorously to see (a) whether the objective is instrumental or symbolic and (b) whether the proposed basis for recognition is formal or functional. Policy responses should pursue coherence in the sense that a new measure should be justifiable in the same dimension of family law that it aims to advance. Accordingly, after considering the position of unmarried couples with children and the vulnerabilities that arise when their relationships break down, one can draw two recommendations. First, all the provinces should regularize a mechanism by which a parent with custody of children can secure an order for temporary possession of premises that have been used as the family home, irrespective of which partner owns or rents it. Concerns about autonomy and consent have least application here, because the children have neither chosen nor consented to the marital status of their parents. The second recommendation, which is based on the economic vulnerability of women with children, is that Quebec should provide for an obligation of support between de facto spouses who have a child together.

Both recommendations are instrumental in the sense that they aim to palliate vulnerability, and they are justifiable on functional bases. Neither recommendation has as its aim the symbolic validation of the worth of unmarried couples; moreover, given their limited scope, neither follows the logic of semblance by assimilating a category of relationship into marriage. Restricting the obligation of support recommended for Quebec to unmarried couples who have had a child together would take account of the diversity of unmarried couples. For example, such an obligation would not affect childless cohabitants in their twenties who are roughly equal in their economic position. Nor would it interfere with the economic relations of older cohabitants, such as those who have already been married and divorced and wish to avoid the legal consequences of marriage. In any case, this indication that the position of adult relationships cannot be considered without reference to the presence of children leads to the next section, which addresses directly the legal relations between parents and children.

Adults and Children

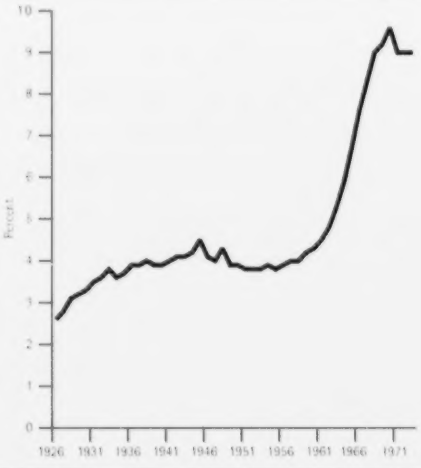
Legal parentage or filiation is the relationship of parent to child in virtue of which laws attach rights and obligations. Unsurprisingly, parentage has complex effects within family law and policy. It directly engages three crucial oppositions: private versus public family law, instrumental versus symbolic recognition and formal versus functional bases for identifying family relationships. Consequences attach to parentage and filiation within the private law of the family in the form of parents' and children's reciprocal rights and duties as well as parents' responsibilities and powers vis-à-vis their children. Within the public law, governments take parental bonds into account in a number of ways, from tax credits to reducing welfare entitlements. Parentage and filiation operate instrumentally, for distributive purposes, and also symbolically, in the sense of the intrinsic worth of the parental bond.[65] Formal and functional bases play out in complex ways. A formal basis for recognition of a parental bond operates in, for example, the registration of a declaration of birth. Functional bases for recognizing a parent-child relationship operate in two ways. One is that some means of establishing the full legal status of parentage or filiation are functional – for example, acting like a parent can lead to a presumption that a person actually is a parent. The other way is that, without leading to parental status, functioning as a parent can also lead to the conferral of some parental rights and duties.

Historically, children's status reflected their parents' relationship. Until the 1970s, the marital status of the parents determined the child's legal status: children born to married parents were "legitimate," while those born to unmarried parents were "illegitimate" and suffered social stigma and legal disadvantages. In some circumstances, illegitimate children could claim support from their parents, but could not inherit from an intestate succession, nor did they become members of the larger family defined by kinship. That state of affairs showed legislatures responding, in a functional way, to the support needs of illegitimate children while withholding from them kinship's symbolic recognition. By the 1960s, however, the percentage of illegitimate living births began to rise sharply (see figure 2), and in the 1970s and 1980s, legislatures abolished the status of illegitimacy.[66] Filial bonds now connect children directly to parents, largely unmediated by marriage – that is, children's parentage can be determined without reference to their parents' marital status; moreover, the content of parental duties does not depend on marital status.

Meanwhile, the early twentieth century had witnessed the enactment of adoption statutes.[67] One of adoption's initial functions had been to fold illegitimate children into legitimate families. Another had been to provide families for the numerous abandoned children living in religious or other institutional care (Lavallée 2005; Roy 2006b). It took several stages of legislative amendment for legislatures to establish that adopted children are full members of their adopted families. Initially, there was resistance to viewing adopted children as fully equal to those born within marriage. Now, however, adoption produces the full effects of "natural" parentage. It thus pursues both an instrumental policy of providing security for children and a symbolic policy of validating the relationship as a legal family bond.[68]

The move toward "open" adoptions, by which a child comes to know his or her birth parents as well as the adoptive parents, shows legislatures responding to the inclination formally to recognize and functionally to make space not only for the adoptive parents, but also for the genetic parents. For example, Ontario's adoption regime now provides for "openness orders" and "openness agreements," measures that contemplate continuity in the child's relationships both before and after adoption.[69] Given the role of agencies run or sanctioned by government in assessing prospective adoptive parents and placing children, adoption straddles the line between the private and public law of the family.

Figure 2
Illegitimate Live Births as a Proportion of All Live Births, Canada, 1926–73



Source: Leacy (1983, series B1-14).

The dominant discourse and paramount consideration for decision-making regarding children has changed from one of paternal and then parental rights to one of the best interests of the child (Deleury and Goubau 2008, paras. 635-7).[70] An open-textured concept, best interests serves as a vessel into which judges in individual cases must pour content. As with spousal support, decisions regarding children take legislated rules as the point of departure, but case law plays a significant role, and trends in judicial interpretation can rise and fall while the authorizing text remains unchanged. Legislatures and judges, however, are working to balance the competing pulls of family law's multiple dimensions, public and private, instrumental and symbolic, formal and functional.

This section first addresses the establishment of legal parental status. It then outlines the effects of parenthood, focusing on the case of family breakdown. Finally, it examines the possibilities for recognizing the effects of parentage on the part of individuals who do not have full parental status. This last issue, like the treatment of adult relationships outside marriage, reveals the grip of the past, in the sense that the traditional legal concept – filiation and parentage in this section, marriage in the preceding one – conditions the analysis. More often, claims are made for assimilation into parental status than for creating a distinct, additional position.

Determining legal parenthood

The rules for identifying parent-child relationships are in flux. By and large, legislatures have not kept pace with changes in family practices. Where legislatures have not adjusted the rules or organizing concepts, judges have been required to fit new forms of parenting into the existing framework (Campbell 2007).

As table 6 shows, the Civil Code of Québec recognizes three models of filiation; in Ontario, there are two models of parentage, as set out in table 7. The models may appear conceptually clear, but the means of proving filiation and establishing parentage combine to produce a picture much more complicated than these paradigmatic cases. Collectively, they reveal attention to at least three major factors: genetic connection, intention to parent and the preservation of family stability. Indeed, recent developments show a simultaneous intensification of both genetic connection and intention as foundations of the legal tie between parents and children (Bainham 2008; Millbank 2008c). The legislative aim for filiation or parentage to recognize a genetic connection is perhaps plainest when a judge declares a man to be the father on the basis of DNA evidence. The registration as mother of a woman who has just given birth to a child probably reflects a focus on genetic connection, although it may also reflect intention in the act of gestation.

As for intention as the basis of a parental bond, a clear instance is a judgment of adoption declaring a person to be a parent or a couple to be parents. Further examples are a woman's declaration of herself as a child's second mother in virtue of assisted procreation in Quebec or as an "other parent" in a case of assisted conception in Ontario. Recognition of intention as the basis for parentage, in these last two instances, is consistent with the theory of adoption. These new means of recognizing the second parent of a child born by assisted conception are, however, more direct than adoption in that they do not require judicial proceedings and a determination that the parentage sought serves the child's best interests.

Other means of establishing parentage or filiation show the legislative concern to protect family stability. Consider the presumption of paternity on the basis of a formal legal status, marriage or civil union, connecting a man to a child's mother. Admittedly, the rule's primary justification may be genetic connection – given the marital duty of fidelity, it may be reasonable to presume that a woman's husband or civil-union spouse fathered her child. But such presumptions also reveal concern, irrespective of genetic "truth," to protect the stability of established families, as well as to place parental duties on the person likeliest to perform them.[71]

The regimes in Quebec and Ontario thus show a mingling of genetics, intention and caring as bases for recognizing someone as a parent, but they differ in the extent to which the form of enacted rules makes this mingling plain.[72] Beyond this snapshot of complexities and contradictory tendencies in the current rules, four issues with respect to parental status call for further discussion: reproductive technologies, parenting by same-sex couples, intentional single parenting and the presence of three parents.

Reproductive technologies

Provincial laws typically do not provide for the full set of disputes arising from the use of reproductive technologies and the parenting practices of Canadian families. Lawmakers have long tolerated a distinction between the legal father and the biological father (Eichler and McCall 1993). In contrast, legal drafters have typically assumed that the child's legal mother

Table 6
Models of Filiation and Modes of Proof under the Civil Code of Québec, 2009

	Model of filiation		
Key features	Filiation by blood	Filiation by assisted reproduction	Filiation by adoption
Content of the model	Paradigmatically understood as a legal bond connecting a child to its birth mother or genetic father.	A legal bond connecting a child to the woman who conceived it by a donation of genetic material within a parental project, or a legal bond connecting a child to such a woman and to her consenting spouse, male or female.	A substitutive filiation pronounced by a court in an adoption judgment made in the best interests of the child, one that connects a child to an adoptive parent or to two adoptive parents and that replaces a previous bond of filiation.
Proof/establishment	• For a woman, declaration of herself as the mother (art. 114, para. 1). • For a man, declaration of himself as the father (art. 114, para. 1). • For a person who is married or in a civil union, declaration as a parent by the married or civil-union spouse (art. 114, para. 1). • For a woman or a man, in the absence of an act of birth, filiation can be proven by uninterrupted possession of status (arts. 523, para. 2, 524). • For a man, presumed a father as a result of being the married or civil-union spouse of the child's mother (art. 525, para. 1). • Where a child's filiation is not proven by an act of birth consistent with uninterrupted possession of status (art. 530), filiation may be determined by a court in an action (arts. 531ff.). Evidence may include DNA (art. 535.1)	• For a woman, declaration of herself as the mother (arts. 114, para. 1, 538.1, para. 1). • For a man, declaration of himself as the father (arts. 114, para. 1, 538.1, para. 1). • For a person who is married or in a civil union, declaration as a parent by the married or civil-union spouse (arts. 114, para. 1, 538.1, para. 1). • For a woman or a man, in the absence of an act of birth, filiation can be proven by uninterrupted possession of status (arts. 523, para. 2, 524, 538.1, para. 1). • For a man or a woman, presumed as a father or a mother as a result of being the married or civil-union spouse of the birth mother (art. 538.3, para. 1).	• For an individual, declaration of filiation by a judgment of adoption (art. 546). • For two persons jointly, declaration of filiation by a judgment of adoption (art. 546).[1] • For the married, civil-union or de facto spouse of the child's mother or father, declaration of filiation by a judgment of adoption (art. 555).

[1] Beyond the gender-neutral language of article 546, the Civil Code of Quebec is explicit that two persons of the same sex may jointly adopt a child (art. 578.1).

will be unproblematically the biological mother. But assisted reproductive technologies now demonstrate that this assumption is artificial and inadequate (Bainham, Day Sclater, and Richards 1999). Providing the egg, carrying the child and commissioning this process are now separable acts that different women may perform in a given instance. Technology thus introduces the possibility that two or three women may have a claim to be the same child's legal mother. Such possibilities press lawmakers and judges to determine more precisely "what is a parent" (Jackson 2006). Disputes can arise, for example, when an infertile heterosexual couple obtain an outside contribution for some component of reproduction and the arrangement collapses, calling parentage into question.

Given the reticence of legislatures, courts are left struggling to balance intention to become a parent, the social fact of having given care and genetic links to a child (Boyd 2007; Millbank 2008a,c). Litigation, the outcome of which may be largely unpredictable, can be costly and divisive. Thus, legislatures that have not yet done so should examine their law of parentage and amend it as necessary to reflect established practices using assisted conception. As Moore observes, it is important that lawmakers attend not only to the freedom of adults to have children, but also to the best interests of children (2003, 75).

Parenting by same-sex couples

A child may have two legal parents of the same sex via several different routes, though not all of these avenues are available in every province. A same-sex couple may adopt a child together[73] or a child, one of whose parents is in a same-sex relationship, may be adopted by the parent's partner. In some provinces, a gay male couple may commission a child from a surrogate mother.[74] In Ontario, one member of a lesbian couple may become pregnant by anonymous donor sperm and both partners

Table 7
Models of Parentage and Means of Proof and Establishment, Ontario, 2009

	Model of parentage	
Key features	"Natural" parentage	Adoptive parentage
Content of the model	Paradigmatically understood as a legal bond connecting a child to its birth mother or a legal bond connecting a child to its genetic father.	A parentage, with identical rights and duties as "natural" parentage, created by a judicial declaration in the best interests of the child; it replaces a prior parentage.

Proof/establishment	• Certification as the mother or the father on a notice of birth (*VSA*, s. 8; *VSA* Regulation, s. 2(2)1.
	• Certification as a child's "other parent" when acknowledged as such by the child's mother, the father is unknown and conception occurred through assisted conception (*VSA* Regulation, ss. 2(1), 2(2)2).[1]
	• For a woman, declaration of maternity by a court once the relationship of mother and child is established on the balance of probabilities (*CLRA*, s. 4(3)).[2]
	• For a man, declaration that paternity is recognized in law where the court finds that a presumption of paternity operates and is not rebutted on the balance of probabilities (*CLRA*, s. 4(2));[3] presumptions operate in favour of paternity in the following circumstances:
	  • a man married to the child's mother at the time of the child's birth (*CLRA*, s. 8(1)1);
	  • a man who was married to the child's mother within 300 days before the child's birth, but is no longer (*CLRA*, s. 8(1)2);
	  • a man who marries the child's mother after the child's birth and who has acknowledged himself to be the child's natural father (*CLRA*, s. 8(1)3);
	  • a man cohabiting with the child's mother in a relationship of some permanence at the time of the child's birth (*CLRA*, s. 8(1)4); and
	  • a man no longer in a relationship of some permanence with the child's mother but who still was within 300 days before the child's birth (*CLRA*, s. 8(1)4).
	• For a man, declaration that paternity is established on the balance of probabilities absent any presumption (*CLRA*, s. 5).[3]
		• For a relative of the child or the spouse of the child's parent, a declaration of parentage by an adoption order (*CFSA*, ss. 146(2)(a), (c)).
		• For an individual, a declaration of parentage by an adoption order (*CFSA*, s. 146(4)(a)).
		• For two individuals who are married spouses or living in a conjugal relationship outside marriage, a declaration of parentage by an adoption order (*CFSA*, s. 146(4)(b)).[2]

Note: *VSA* = *Vital Statistics Act* R.S.O., 1990, c. V.4; *CLRA* = *Children's Law Reform Act*, R.S.O. 1990, c. C12; *CFSA* = *Child and Family Services Act*, R.S.O. 1990, c. C11; VSA Regulation = VSA General Regulation, R.R.O. 1990, Reg. 1094, as am. by O. Reg. 401/06.

[1] This amendment was made by O. Reg. 401/06 after *Rutherford v. Ontario (Deputy Registrar General)* (2006), 81 O.R. (3d) 81 (S.C.J.), in which the Superior Court of Justice held it to be discriminatory, contrary to s. 15 of the Charter, that a male partner could certify himself as a child's second parent absent proof of paternity while, in cases of assisted conception, some female partners were refused certification as a parent on the notice of birth.

[2] The legislation refers to "spouses," giving "spouse" the same meaning as in Parts I and II of the Human Rights Code, R.S.O. 1990, c. C.11, s. 10(1).

[3] Evidence used may include blood tests and DNA tests (*CLRA*, s. 10).

may register themselves as parents on the declaration of birth. Furthermore, in Quebec, a comprehensive regime enacted in 2002 sets up a presumption of parentage on the part of the married or civil-union spouse of a woman who gives birth via a "parental project," which exists when spouses agree to have a child together using a genetic donation from someone else (Moore 2002a; Kirouack 2005; Leckey 2009c).[75] Whatever the social practices of gay men and lesbians who become parents, these scenarios preserve what Kelly (2004) calls a "nuclear" model: the constraint that, in law, a child can have at most two parents.

In the case of lesbian couples, difficulties may occur if a known genetic father asserts paternity contrary to an earlier agreement that he would be a mere donor (Boyd 2007). There can also be problems where a lesbian couple have a child with a known donor and later wish for the woman not yet a mother to

replace the father as second parent by adopting the child. In 2009, in *M.A.C. v. M.K.*,[76] the Ontario Court of Justice refused to dispense with the father's consent so as to erase his bond of parentage in favour of the mother's partner (Kari 2009).

Intentional single parenting

Several legal possibilities may lead to a child's having just one legal parent – for example, an individual may adopt a child.[77] Moreover, the possibilities for a woman to bear a child for whom she will be the sole parent vary from jurisdiction to jurisdiction. A woman may give birth and declare no father, whether she knows the genetic father or, as in the case of anonymous donor sperm, she does not. Quebec's rules on filiation are explicit that a woman may intentionally become a single mother, even where the genetic father is known, so long as he consents to being a mere genetic donor.[78] Family regimes in other provinces may be less receptive to intentional solo parenting, so that, if a woman who is a child's sole parent seeks public income support, government agencies may attempt to identify a father from whom to exact child support. Alberta courts, for example, have refused to accept as binding a joint declaration by a woman who had conceived her child by donor sperm, and her male conjugal partner, that parental duties and status would never be ascribed to the male partner (Cossman 2007).[79]

As a policy matter, should rules of family law facilitate the creation of single-parent families? There are competing considerations. On one hand may be a woman's autonomy to define the contours of the family into which she brings and raises a child; this interest may include raising a child without legal ties to a man (Boyd 2007). On the other hand may fall concerns about burdens on the social system and the best interests of the child, especially given the poverty rate of families headed by a single mother. Presumably the risk of inadequate resources is higher if, from the outset, only one adult, not two, owes support to the child. Arguably, the paths leading to intentional single parenting by conception are distinguishable from single-parent adoption: the adopted child already exists and lacks a family with adequate resources.

The presence of three parents

New parenting practices are putting strain on lawmakers' assumption that a child should have at most two parents. In *A.A. v. B.B.*,[80] an Ontario court declared one child to have a third legal parent. A lesbian couple and a man had planned the conception of the child and were raising him amicably. All parties wished for the partner of the birth mother to obtain parental status. Adoption would have required the father's consent and erased all connections between the child and the paternal relatives, including the father himself. At trial, the judge found that the child's best interests militated for the legal recognition of his second "mother." The Court of Appeal determined that the legislature's failure to consider same-sex parenting when it overhauled the law of parentage in the 1970s had resulted in a legislative gap. It exercised its inherent jurisdiction to fill this gap by granting the declaration sought. Media coverage emphasized the departure from the traditional view that a child could have no more than two parents (Hanes 2007; Lai 2007). Legal scholars, by contrast, have rightly noted its limited effect as precedent (Bouchard 2007; LaViolette 2007), and the court did not interpret the legislation as providing any general entitlement to such recognition. Future applicants in analogous circumstances would have to prove that recognizing a third parent served that child's best interests.

Predictably, Ontario's "three parents" case has generated varying reactions. Some scholars, with relief, read Quebec's rules on filiation as precluding such an outcome (Prémont 2007).[81] While facts such as those in *A.A. v. B.B.* may be relatively rare, they point to the need for creative policy work so as sensitively to recognize relationships between adults and children excluded by family law's categories of parentage.

The entailments of parental status after unions break down

Legal duties connecting parents to their children are identical whatever the model of filiation or parentage and whether or not a child's parents are together. Rules setting out parental duties appear in provincial laws and in the federal *Divorce Act*. Where parents live together, it might be supposed that little thought is given to their legal duties, since performance of such duties is often understood as intrinsic to the carrying out of family life. It is typically where an intimate relationship between the parents has broken down, or never existed, that the place for legal enforcement of parental duties is greater.

To give a sense of the prevalence of these cases, a substantial minority of Canadian families (15.6 percent) consisted of lone-parent families according to the 2006 census; within that group, approximately 30 percent of

the lone parents were divorced and another 30 percent had never married (Milan, Vézina, and Wells 2007, 8, 15). Where a child's parents do not live together, the allocation of custody can be a major issue.

Custody

Parents may agree as to where the child will live and how they will exercise their rights and carry out their obligations. The vast majority of divorcing parents negotiate a custody arrangement. Where they cannot agree, however, litigation follows, and a judge will decide who has custody and who has access and on what conditions.[82] Gendered rules – preferring maternal custody for young children and paternal custody for older ones – have given way to gender-neutral rules that focus on the best interests of the child. The *Divorce Act* casts the best interests of the child in general terms, subject to two specifications. One is that a court's consideration of custody matters must not address a person's past conduct (such as adultery) unless it affects that person's ability to act as a parent.[83] The other is the so-called friendly parent rule whereby a court must follow the principle that a child should have as much contact with each spouse as is consistent with his or her best interests. Accordingly, when considering one spouse's application for custody, the court must consider that person's willingness to facilitate the child's contact with the other spouse.[84]

The legislative regimes say little about the circumstances in which judges should award joint or shared custody. Unlike those in some other jurisdictions, such as Australia (Rhoades 2008), Canadian legislatures have not enacted presumptions of shared care or custody. Nevertheless, a change in judicial practice is observable. In 1980, where custody of dependants was determined through divorce proceedings as opposed to by parental agreement, it was awarded solely to the mothers in four-fifths (78.2 percent) of the cases; in 2003, custody was awarded solely to the mother in less than half (47.7 percent), and to both spouses in 43.8 percent, of such cases (Milan, Vézina, and Wells 2007, 15; see also Lapierre-Adamcyk 2003). Indeed, Kirouack suggests that the cases show the emergence of a rebuttable presumption favouring shared custody (2007, 722-7).

Absent legislative guidance, courts have developed guidelines for their recourse to shared custody. Judges consider the parents' ability to communicate with each other and the absence of conflict between them, the nearness of the parents' respective homes and the child's wishes (Verdon and Tétrault 2004, 217-26). Despite some observers' sense that a presumption favouring shared custody has crystallized, judges insist that they focus on the individualized, context-specific decision that will serve the child's best interests (Verdon and Charette 2003, 263-4). While it makes decision-making less predictable, such an individualized, discretionary exercise by judges may be appropriate given the diversity of parenting situations and the bluntness of legislated presumptions (Gilmore 2006). Moreover, some research indicates that a child's flourishing depends less on the structure of custody than on the family environment. The presence or absence of conflict between separated parents is a key factor (Otis and Otis 2007; Rhoades 2008). As Tétrault observes, shared parenting is no panacea (2006, 145).

Data on the living arrangements of recently divorced or separated mothers and fathers provide a snapshot wider than the set of custody disputes in divorce proceedings. The 2006 census revealed that 30 percent of recently divorced or separated fathers and 66 percent of recently divorced or separated mothers were lone parents (Lochhead and Tipper 2008, 10). Moreover, although four-fifths (80.1 percent) of lone-parent families consisted of women and their children, the proportion of lone-father families was increasing faster than that of lone-mother families, which Milan, Vézina, and Wells suggest is due in part to the decrease in awards of sole custody to mothers and the increase in joint-custody arrangements (2007, 9, 15). At the same time, looking beyond the effect of legislation and judicial decisions, the increased prevalence of shared parenting – especially in cases not involving judges – also may result from wider social change and parents' moral sense of appropriate parenting (Laing 2006; Melli and Brown 2008).

Child support

In addition to custody, parents have a legal obligation to support their children in a way that is commensurate with their income. While provincial laws and the federal divorce statute regulate its performance, the duty exists independently of any statute or court order. Consequently, where a parent's income increases, the content of his or her child-support obligation increases, even if a previous order, based on past income, had fixed the support owed (Tétrault 2008, 342-70).[85] As in most comparable countries, the duty does not depend on the marital status of a child's parents (Skinner and Davidson 2009, 34-5).

Legislatures have made varying choices in setting the duration of this duty – for example, it may cease on the child's reaching the age of majority or it may persist through full-time post-secondary studies (Prémont 2001). Acting on concerns to increase fairness and reduce transaction costs, legislatures have moved away from discretionary rules by imposing mandatory guidelines for child support.[86] This move is part of an effort to increase the rate of payment by support debtors, an effort thought by some to imply a greater parental responsibility for the upbringing of children and a lesser role for the state (Mossman 1997; Robson 2008). Under the Federal Child Support Guidelines, noncustodial parents pay child support to custodial parents based on the former's income. For each province, the guidelines set out support according to the number of children and the income of the paying spouse, subject to factors such as special expenses and undue hardship. While the exceptions show a parliamentary intention to inject flexibility into the regime, they also increase uncertainty and the prospects of litigation.[87]

Recent decades have witnessed significant reform in the enforcement of private support duties, which falls primarily within the authority of the provinces and territories (Skinner and Davidson 2009). During the 1980s and 1990s, provincial and territorial governments created maintenance enforcement programs (MEPs) to provide administrative support to payers and recipients of child and spousal support. The money collected is paid to the recipient whether he or she resides inside or outside the enforcing province or territory. As of March 2008, 66 percent of cases were in compliance with their monthly support payments in the 10 reporting jurisdictions (Statistics Canada 2009, 5-9). Admittedly, not all support arrangements are registered in an MEP – for instance, of the 517,000 cases of divorce or separation with children with a support arrangement, 190,000 were registered in an MEP (Martin and Robinson 2008, 10). Still, the enforcement regimes in place make serious efforts to ensure that debtors execute their duties of family support.

In principle, custody of a child and the parents' obligation of support are conceptually distinct. Yet, as a practical matter, studies suggest a strong positive link between the frequency of a nonresident father's visits with his children and the likelihood that he regularly pays support (Juby et al. 2007). Furthermore, while the *Divorce Act* does not direct judges to award shared custody, the federal guidelines encourage potential payers of support to seek shared custody by providing that, where a spouse exercises a right of access to, or has physical custody of, a child for at least 40 percent of the time, the support that spouse owes is determined by considering the table amount, the increased costs of shared-custody arrangements and the conditions, means, needs and other circumstances of each spouse and any children.[88]

Shared custody also requires the parents to determine who will claim the fiscal credits and benefits associated with custody of a child (Vincent and Woolley 2001; Daoust 2005; Tétrault 2007a, 469-75). Since 1997, child-support payments have been "tax neutral" – that is, payers of child support do not deduct it from their taxable income, while custodial parents receiving child support do not declare it in theirs.[89] This approach represents what Payne and Payne (2006, 281) call a "radical change" from the former regime, which had allowed the payer to deduct support payments from his taxable income and required the recipient to declare them in hers.

Still, despite this tax neutrality, the private regimes of child support do not operate in isolation from public regimes. Public agencies are concerned with the enforcement of private support obligations. All provinces and territories treat child support as income for determining the amount of monthly social assistance benefits, and benefits otherwise payable to custodial parents may be reduced by the amount of child support (Dufresne 2001). Family members seeking benefits are obligated to exercise their rights to family support; if they do not, the amount of assistance they receive can be reduced by the amount not claimed.[90] Moreover, government agencies may require a parent who has already sought child support to enrol the recipient in an enforcement mechanism (Martin and Robinson 2008, 11).

Arguably, parent-child relationships raise policy issues beyond the period during which private support duties operate. For example, young adults increasingly are living in their parents' homes: according to the 1986 census, 32.1 percent of young adults ages 20 to 29 lived in the parental home; in 2006, 43.5 percent of young adults did so (Milan, Vézina, and Wells 2007, 28). Moreover, lone-parent families were far likelier than other family structures to have older children at home: the 2006 census found that 10.6 percent of married-couple families and 2.4 percent of common-law-couple families had children ages 25 and older at home; by contrast, more than one-fifth (22.2 percent) of lone-parent families had such children at home.

These findings show a practice of family life that differs from the model implicit in the termination of child-support duties when a child reaches the age of majority or completes post-secondary schooling, and policy-makers should consider the implications of this pattern for young adults and their parents. Is further support required to help young adults make the transition to economic independence? What impact does the presence of grown children have on parents' ability to direct resources to retirement and other needs? In particular, the incidence of this pattern among single-parent families invites analysis. Is it an entirely positive sign of family solidarity? Or does it suggest that children raised in families headed by single parents have greater difficulty acquiring self-sufficiency and integrating themselves into the workforce?

Parental figures without legal status

In addition to the right to custody and the duty to support a child, contemporary family law provides possibilities to recognize a parent-like relationship between a child and an adult who is not a parent. Legislation in every jurisdiction provides that a court may award custody or access to another person in furtherance of the best interests of the child. Such an order, however, does not confer parental status on the individual in question, which confirms that the child's best interests can trump a parent's claim to custody derived from formal parental status.[91] Though rare – in 2004, only in 50 of 31,764 court decisions of child custody in divorces were children awarded custody to a person other than the husband or wife[92] – this legal possibility is symbolically significant. It shows an instrumental willingness to separate custody of the child, determined by reference to the child's welfare, from the usual sense that parental responsibilities and rights flow from formal parental status and should overlap with it. It also arguably provides courts with an indirect means of recognizing functional bonds of family even where parental status has not been formalized.[93] Less drastic and more common are orders granting access to third parties (Tétrault 2000). They provide a means to formalize, for example, the right of grandparents to see children even though their former daughter-in-law has custody.

At the same time, most family regimes in Canada obligate someone who has acted like a parent toward a child (a de facto parent) to support that child. Exceptions are the provincial regimes of Quebec[94] and Nova Scotia.[95] Where such rules exist, they use the model of ascription. For example, the *Divorce Act* states, in subsection 15.1(1), that a competent court may order either or both spouses to pay for the support "of any or all children of the marriage." Subsection 2(2) of the Act extends the definition of "child of the marriage" to include "any child for whom they both stand in the place of parents" and "any child of whom one is the parent and for whom the other stands in the place of a parent." The Act does not, however, define "standing in the place of a parent," leaving that task to the courts.[96] Where a child lives with an aunt and uncle during their marriage, the child might be regarded as a "child of the marriage" and both might be regarded as standing in the place of a parent toward the child. The more common case concerns a step-parent.

This recognition of a person as a de facto parent leads, instrumentally, to the imposition of a duty of support. It does not lead, however, to the formal status of parentage or filiation, with its symbolic value. For example, while legislation regarding intestate successions sets out rights of a deceased person's children and other relatives, such rules do not provide for a child to inherit from a de facto parent. Moreover, the de facto parent's duty of support under the *Divorce Act* is unilateral; by contrast with the reciprocal duty of support in provincial law, it leads to no possibility for the adult to claim support from the child in the future. Such a duty can be understood as justified by the best interests of the child – specifically, the concern to minimize the impact of the breakdown of an adult relationship on the child. The justification must also indicate a further basis for the de facto parent's liability, perhaps induced reliance and the past relationship between adult and child (Ferguson 2008). Otherwise, it could conceivably serve a child's best interests to collect resources from any potential payer, whatever his or her relation to the child. Some discussions of the duty of the de facto parent's obligation draw on the symbolic dimension of recognition (Harvison Young 2000). Fallback on legal enforcement is only necessary, though, where the adult resists paying. It is fair to wonder in such circumstances how much of the relationship remains for the law to affirm.

Such rules come into play on the breakdown of the relationship between the adults. The court's role arises if, say, the child's mother claims support from the de facto parent on the child's behalf and the adult denies that he stood in the place of a parent. A judicial determination as to whether a person met that standard will consider a variety of factors, but, in essence, the

question is whether the adult treated the child as a member of his or her family. According to the Supreme Court of Canada in *Chartier v. Chartier*,[97] once it is determined under the *Divorce Act* that a spouse has stood in the place of a parent toward a child of the marriage, that spouse is subject to the same duty of support as a parent. The de facto parent, in turn, gains the right to apply for custody or access.[98]

For a step-parent or other de facto parent to owe child support, it is not necessary for the other parent to be absent, unknown or incapable. The result is that more than two adults may owe support to a given child. The possible recognition of three (or more) adults with a child-support obligation after the breakdown of an adult relationship contrasts sharply with the regimes of parentage, which never contemplate more than two parents. The legislative policy seems to be that the child's best interests are served by increasing the set of possible payers of support while confining the legal parentage to a model more closely resembling "natural" reproduction, at least as far as the number of parents is concerned.

Without becoming a parent by adoption, an adult may thus accumulate child-support obligations in moving from one blended family to another. The duration of a duty of child support is fixed, prospectively, in relation to the child's achieving the age of majority. It is not fixed, retrospectively, in relation to the duration of the household within which the payer performed a parental role. Consider a man who marries a woman who has a two-year-old child. On the breakdown of the marriage three years later, he might be found to have stood in the place of a parent and could owe support to the child for more than a dozen years. Such enduring obligations, even after a relatively short relationship, can be problematic given the sequence of relationships that many people experience. The frequency of unions – married or unmarried – in the course of a lifetime is now substantial, as table 8 shows; indeed, 16 percent of recently divorced or separated women and 17 percent of men live in a step-family without children common to the partners of the adult conjugal relationship (Lochhead and Tipper 2008, 10). The frequency of sequential relationships likely makes problematic a policy based on increasing support obligations that survive relationships.

The onerous character of the support duty imposed on de facto parents has led to caution in the years since the *Chartier* judgment. Rogerson (2001), for example, notes the concern that support duties might attach after a relationship so brief that serious bonding might not have occurred. It has also been suggested that the de facto parental duty is not appropriately recognized where the other biological parent is involved in the children's lives.[99] Indeed, Quebec courts, noting the extent to which the *Divorce Act* departs from the traditional civil law of the family, have called for its restrictive interpretation in that province.[100] In 2006, seven years after *Chartier*, the judgments of lower courts still showed an inconsistent approach (Payne and Payne 290-3).

The differences between the respective provincial regimes and the federal divorce scheme can result in substantially different legal characterizations and duties on the part of similar households. Children living in a blended family have different rights, during their parent's relationship and afterwards, depending on their province of residence or on whether a parent marries a new partner. In Quebec, one of the exceptions to the trend of recognizing a support duty for de facto parents, although an individual may owe child support after divorce from the child's parent, an individual living unmarried with the child's parent does not owe such support. For another example, this time across a

Table 8
Frequency of Union,[1] by Age Group,[2] Canada, 2001

Age group	No union		One union		Two unions		Three or more unions	
	(N)	(%)	(N)	(%)	(N)	(%)	(N)	(%)
35-39	246,000	9.3	1,873,000	70.9	426,000	16.1	98,000	3.7
40-44	180,000	6.8	1,813,000	68.2	508,000	19.1	156,000	5.9
45-49	117,000	4.9	1,719,000	72.1	405,000	17.0	143,000	6.0
50-54	104,000	4.9	1,463,000	69.4	431,000	20.5	110,000	5.2
55-59	61,000	3.7	1,220,000	74.9	279,000	17.1	69,000	4.2
60-64	48,000	3.8	1,024,000	79.8	175,000	13.6	36,000	2.8
65+	181,000	4.9	3,029,000	82.2	425,000	11.5	49,000	1.3

Source: Statistics Canada, CANSIM database (table 112-0002); figures may not add to totals due to rounding.
[1] "Union" refers to marriages and common-law unions.
[2] Population aged 35 and over.

provincial boundary, a blended family in Quebec in which the adults are unmarried will produce no support duty on the part of the step-parent, while the same facts in another province might lead to the step-parent's duty to support the child.

Lawmakers have, instrumentally, pursued children's best interests by providing for custody and access and by ascribing a support duty to de facto parents, but there is arguably room for further innovation. Current regimes attach s ort duties by recognizing some nonparents as rents. This is plain in the statutory definitions that enlarge the context-specific meaning of "parent." The logic of the *Divorce Act*'s regime, as interpreted by the Supreme Court in *Chartier*, maintains the on/off sense that a person either qualifies as a "parent" and owes support or does not so qualify and owes nothing. It might be appropriate, however, to delineate an intermediate position between parent and stranger (Leckey 2007c). The rigid use of parentage as the paradigmatic model for recognizing rights and duties on the part of an adult toward a child replicates the pattern of maintaining marriage as the model for regulating adult relationships. An intermediate, less onerous category might serve usefully in the case of blended families, as well as in the case of open adoptions.[101] Careful reflection would be required to determine the dimensions of family regulation that such a position should engage. Would it have effects under public law, private law or both? Under the private law of the family, an intermediate position might bring a right to access while subordinating any claim for custody to one by a parent. It might also bring, say, a secondary duty of support enforceable only in the absence or incapacity of the parents. Would there be a symbolic recognition of the relationship with some kind of status and, if so, what would it be called? Would the model be ascription or might it be appropriate for an adult to be able to register to assume this new role? What would be the benefits of such a designation relative to the possible reduction in the autonomy of a child's legal parents, especially a custodial parent? Such determinations are not easy ones, but family practices and the cases litigated testify that the categories "parent" and "legal stranger" do not adequately capture the set of caring adults in the lives of many children.

Policy Discussion

As a result of developments in family law over the past few decades, men and women are now formally equal in marriage. At the same time, however, marriage rates have declined, so that fewer couples benefit from the current regimes. Unmarried cohabitants and same-sex couples have acquired increasing legal recognition, but that recognition remains modelled on total or partial assimilation to marriage in a way that can be confining. As for the regulation of relations between adults and children, it remains in crucial respects in the grip of the binary model by which someone is either a child's parent or a stranger to the child.

This section collects the recommendations made in the preceding discussion regarding some avenues for further legal changes. It then considers the effectiveness of the private law of the family at securing the economic welfare of those individuals to whom it applies, and examines how satisfactorily obligations are enforced and distributions made under the "private welfare system" of the family (Halley 2001, 110). Finally, underscoring the limits of the model of private support, it sets out elements of an appropriate approach on the part of policy-makers.

Recommendations in relation to family law

Despite the reforms to family law in recent decades, the persistence and growth of diverse forms of family life suggest that further reforms are in order, most of them relating to private family law. The following recommendations appear in the order in which they emerged in the text above.

- First, where policy-makers aim to palliate the vulnerability of some family members, they should take care to ensure they identify an accurate marker of vulnerability. Focusing on membership in, say, a religious minority as a marker of vulnerability risks aggravating prejudice as well as overlooking vulnerability in other groups. Accordingly, rules of private law – such as limits on the scope for private agreements and dispute settlement – should be scrutinized to ensure they do not reproduce prejudicial or discriminatory attitudes. It is possible that lack of education, isolation and inadequate resources, rather than membership in a minority religion, represent the major obstacles to the pursuit of family justice. While litigation under the Charter has, arguably positively, expanded the

legal definitions of family, the development of protective and distributive rules of private law need not restrict itself to markers that are salient in constitutional equality litigation. Thus, although marital status is an analogous prohibited ground of discrimination under section 15 of the Charter, the presence of children in a family may be a greater indicator of potential economic inequality than the marital status of adult partners.

- Second, policy-makers should examine the appropriateness of the current treatment of polygamy under public and private family law and under the criminal law. The ongoing criminalization of polygamy represents a determination that polygamy is harmful and inconsistent with basic Canadian morality. This determination, however, calls for scrutiny, given that much of the specific harmful conduct often associated with polygamy (abuse, sexual exploitation, underage sexual relations) is already independently criminalized. Such examination should distinguish carefully the various objectives pursued (instrumental, symbolic) as well as the means chosen.
- Third, the provinces should provide for a possible right of temporary occupancy of a family residence on the part of a former unmarried partner who has custody of children. In most provinces, the protective regime for the matrimonial home or family residence applies only in the case of married spouses. Yet, irrespective of adult partners' marital status, there is little reason to suppose that the breakdown of their parents' relationship affects the children of unmarried parents any less than it does the children of married parents. The effects of such a breakdown on children might be palliated if a custodial parent could continue to occupy what had been the family home for a limited time, irrespective of which partner held title to the property or was the lessee.
- Fourth, in Quebec, the legislature should enact a reciprocal obligation of support on the part of de facto spouses who have had a child together. The legislatures in every other province already have concluded that the interest in protecting a needy former cohabitant outweighs the autonomy interest associated with imposing no obligations absent consent. Bearing in mind the sensitive issue of autonomy in political discussion of this matter in Quebec, this proposal is less drastic than an ascription of a duty of support to all de facto spouses. The restriction of such an obligation to couples who have had a child together is meant to tailor the proposal most directly to couples where economic imbalances are likeliest. Like other support duties, its aim would be to provide the recipient (probably temporarily) with the necessities, in relation to the payer's ability to pay. In cases where one partner was able to pay, such an obligation would palliate the economic vulnerability experienced by the other partner on relationship breakdown.
- Fifth, legislatures should consider creating registration options for family relationships other than conjugal couples. The current conjugal model does not exhaust the set of interdependent relationships that could benefit from having a default regime that they could opt into. By contrast with the private-law model, a registration option is recognized by third parties and, especially, by government. Such an option thus would increase the possibilities open to nonconjugal forms of family. Consistent with this paper's concerns about the grip of the marriage model on the private and public law of the family, this proposal would invite legislatures to consider crafting registration regimes that did not simply replicate the rights and duties of marriage. This point is especially important in Quebec, where the obligatory regime of marriage is the most onerous.
- Sixth, legislatures that have not yet done so should amend their law of parentage to reflect established practices concerning the use of assisted conception, including the use of known sperm donors who do not intend to acquire paternal status. Problems arise when assisted conception collides with the notion of paternity as flowing from a genetic connection. In many jurisdictions, however, it is difficult for, say, a lesbian couple to conceive a child using sperm from a known donor without the risk of the donor's later asserting paternity on the basis of his genetic link to the child. Given that a parent may consent to a child's adoption and thus to the termination of all parental ties, it seems unnecessarily limited not to allow a known donor to preclude establishment of parentage. The uncertainty and litigation in this field runs counter to the best interests of children. Moreover, the expenses and stresses associated with legal regimes that do not recognize common parenting practices further burden couples – whether same-sex or opposite-sex – who are already marginalized.
- Seventh, provincial legislatures should consider the creation of an intermediate status between parent and legal stranger. The basic logic now is that a

person is either a child's parent or a legal stranger toward that child. Thus, under the principal adoption regimes, a parent's consent to the adoption of his or her child terminates parentage. Moreover, no parental bond attaches a step-parent to his or her partner's child except via adoption (although a duty of support may arise). Yet, in many families, more than two adults play significant, sustained, parent-like roles. It thus would be appropriate to craft an intermediate status for such situations that might entail, for example, a right to custody and access, but to a lesser degree than that of parents. Such a status also might bring a secondary duty of support, but enforceable only if the parents are unable to support the child. The status could be useful, for instance, in the case of blended families where it was unsuitable for the step-parent to adopt his or her partner's child because the other genetic parent was still active in the child's life. This recommendation has special purchase in the case of Quebec, where there is no child-support duty under provincial private law on the part of de facto parents. The fourth and seventh recommendations, with their focus on Quebec, hint that the private law of the family in that province could benefit from a review.

Limits of the private law of the family and guidelines for the design of public programs

Although the reforms outlined above ought to improve the well-being of family members, the capacity of the private law to secure such improvement is clearly limited. There is thus a need for complementary public policies. Most significantly, the gap between the formal equality of spouses in the law and the financial positions experienced by men and women mean that families headed by single parents, especially by women, are much less well off than families headed by a couple. This feature of contemporary family life prompts the question as to whether the support obligations of parents and former partners should be enforced more stringently. However, while no system of enforcement is beyond improvement, governments have already overhauled the enforcement of support obligations in recent decades, and it is not evident that stricter enforcement of existing obligations would solve the economic difficulties experienced by families headed by single parents. Indeed, for such families, the absence of an arrangement for support may well be a bigger problem than the failure to enforce one.

The Supreme Court of Canada has enjoined judges to emphasize the compensatory role of spousal support, stating explicitly that, where a needy former partner cannot attain self-sufficiency, marriage places the primary burden of support not on the state, but on the other spouse (Brodeur 2000).[102] Still, such an approach has consequences only for the relatively small proportion of families where a respondent spouse can pay significant spousal support. Indeed, most divorces or separations do not involve support arrangements. Between 2001 and 2006, of the roughly 2 million cases of divorce or separation, including the end of unmarried unions, only about a third had an arrangement for support payments in place, although nearly two-thirds of cases involving children had a support arrangement (Martin and Robinson 2008, 10).

As for division of property, such regimes redistribute the assets or the value of assets already held within the marriage, no matter which spouse holds title to them, but they cannot increase the total pool available for the enlarged needs of spouses who are separating to form two households. Part of what the data show is simply the effect of dividing the resources of a two-adult family with children into two households, many of which consist of a mother with children. Altering the distributive rules and enforcement mechanisms, however, fails to tackle the structural problem that, in many cases, the total amount of resources is insufficient to support two households after breakdown. More broadly, formal equality's failure to secure substantive or material equality hints at the limits of private family law, which, with its focus on support paid by parents to children and by one spouse to the other following the breakdown of an adult relationship, simply cannot by itself assure the material security of Canadian households.[103]

The limits of the private law of the family thus lead to recognition of the place for robust social programs (Baker 2006). To that end, policy-makers may wish to take stock of innovations in Quebec respecting daycare and parental benefits (Campbell 2006; Phipps 2006). Such programs can be expected to affect the allocation of tasks between partners during a relationship, thus potentially reducing the woman's disadvantage if the relationship ends. There is also space for income support, child care and job training to provide more support for single-parent households (Cleveland et al. 2008).

Admittedly, different political views lead to different senses of the appropriate relative weight of private

and public support duties, but one can venture a number of guidelines for the design and implementation of public policy that is supportive of contemporary families without presuming a political judgment as to the proper balance. The guidelines begin with public policy as it uses relationships that are already recognized by the private law of the family, but then move toward public policy using definitions of family distinct from the private law. That is, the sequence of these guidelines points to public policy autonomously creating its own definitions of family.

- First, where public programs are based on relationships recognized by private family law, they should not reduce entitlements on the unverified assumption that private support duties are paid. Income-assistance programs require claimants to enforce claims to family support and to deduct such support from entitlements. Such policies are especially problematic, however, in two respects. One is where a private-support duty is owed to the individual who is claiming public support but the duty is not being enforced. The other is where the public program defines the set of "family" members who should support one another more widely than do the rules that actually impose private duties of support. It is within social assistance programs that governments have been most creative and enthusiastic about adopting a functional approach in order to recognize multiple forms of family (Tranter, Sleep, and Stannard 2008); thus, some programs have clawed back public benefits on the assumption of nonexistent private support (Gavigan 1999; Gavigan and Chunn 2007).[104]
- Second, policy-makers should be alert to the potential inequity and vulnerabilities where relationships are treated as family only in some jurisdictions. The same relationship can attract different rights and obligations from one jurisdiction to another. For example, an unmarried cohabiting couple are subject to a reciprocal duty of support in the common-law provinces but not in Quebec, while the set of individuals subject to a reciprocal duty of support is larger still under Alberta's regime of adult interdependent relationships. Similarly, a stepfather may owe his stepchild support in most provinces but not in Quebec. To some extent, these divergences are the predictable outcome of a federal system in which the provinces devise the family law. Such variety nevertheless complicates the development of public policy, especially at the federal level, where similar households contain different support duties. Policy-makers should be particularly alert to the asymmetrical application of private-support duties in Quebec, where the rate of unmarried cohabitation is so high.
- Third, where public programs define a family relationship differently than does the private law, steps should be taken to reduce confusion and avoid surprise. The same relationship may qualify simultaneously as a legally recognized family relationship for some purposes but not for others. In Alberta, for example, the parties to an adult interdependent relationship may be recognized as being in a family relationship for provincial but not for federal law. Similarly, an unmarried cohabiting couple in Quebec may be "spouses" under federal and provincial public programs but not owe each other a duty of support under the Civil Code. Treatment of individuals as family for public but not for private purposes risks confusion – an individual's correct awareness that she qualifies as a "spouse" for public purposes may induce a false sense that it is unnecessary to use the private law to formalize economic relations with her partner. Where there is a disjuncture between public and private definitions, governments should take active measures to ensure that individuals understand their status, rights and duties.
- Fourth, policy-makers should identify relationships relevant to family policy proactively, rather than merely reacting to equality challenges under the Charter. Some reforms to family law with respect to unmarried opposite-sex couples and same-sex couples have resulted from challenges under the Charter, but the Charter's effectiveness as an instrument for developing family policy in the case of same-sex couples is arguably the exception, not the rule. Gays and lesbians constituted an identity group whose historical marginalization triggered the concern with human dignity associated with equality claims (Leckey 2009b). Moreover, the claims made were for recognition in the existing categories of family law.[105] Other kinds of relationship potentially relevant to family policy – for example, people "living together apart," persons with disabilities and their caregivers – may have neither the group identity nor the desire to assimilate into existing categories. The discourse of equality and dignity under the Charter has dominated family policy in recent years, but the breadth of family situations that do not match up with Charter claims makes it appropriate for policy-makers to supplement this discourse by reviving notions of good public policy and

fairness, such as justified legislative reforms to marriage and parentage before entrenchment of the Charter (Leckey 2007a).

- Fifth, in designing public programs, policy-makers should not necessarily rely on definitions of family relationships in provincial family law. It is common to use designations from family law in the design and delivery of government programs (Ryrstedt 2006). Income tax legislation, for example, uses conjugal relationships as a proxy for certain kinds of economic closeness. The presumed closeness within such relationships may attract special scrutiny of transactions to ensure they are not intended to evade tax. It also attracts special benefits, as in the case of favourable tax treatment of contributions to spousal or common-law partner registered retirement savings plans or of the transfer on death of registered retirement funds.[105] Yet the categories of the private law of the family may be unreliable for government programs. The focus on marriage as model has meant that family law does not recognize relationships – "living together apart," for instance, or nonconjugal cohabitants – that may well trigger the policy concerns motivating public programs. Similarly, individuals who do not have parental status under the law of filiation or of parentage may play a significant role in a child's life, in a way relevant to public policy. Public programs also may need to be designed to respond to the needs of interdependent relationships with more than two members and of the relationships between differently abled individuals and their caregivers (Hetzler 2003).
- Sixth, recognition of new family relationships should match coherently a response to a policy problem. This guideline relates directly to the previous one – indeed, the two should be followed together. The design of family policy should take into account the distributive, instrumental role of family law and policy as well as the symbolic role. If the policy objective is to grant symbolic recognition to a category of relationships, it should not carry out distributions irrelevant to that objective. Specifically, new definitions of family intended as "progressive" and as affirmative of the Charter right to equality should not have a regressive impact, as arguably occurred when cohabiting same-sex couples suddenly were enfolded into public and private regimes. To reduce the likelihood and impact of such regressive consequences, policy-makers should take a global view of the impact of recognition of a new form of family relationship on the range of public programs (and, where relevant, private duties). While any change in family definitions is likely to produce uneven distributive effects, fine-grained analysis can help to avoid imposing a negative impact on individuals who are already relatively vulnerable. Sensitivity to the respective strengths and weaknesses of the ascription and registration approaches is also crucial. Where individuals opt into a form of relationship recognition, the concerns of unintended regressive consequences can be reduced. It is appropriate to pursue symmetry insofar as duties should not be imposed under private law without the corresponding benefits under public programs.

Conclusion

This study has traced major developments in Canadian family law. It has drawn out the pluralism of contemporary family law, in the models of family life and in the ways that laws and programs take notice of them. Contemporary Canada has no singular "family" and no singular "family law." Though the point is sometimes forgotten, there has always been a gap between the practices of family life and the ideals of family law (Noreau 1999). Now, however, the pluralism is arguably more pronounced. The legal diversity is especially rich within the Canadian federation: federal and provincial orders of government generate rules of family law, and they do so by drawing from two legal traditions, the civil law and the common law.

In presenting changes to marriage and divorce, to adult relationships outside marriage and to relations between parents and children, the study has, descriptively, distinguished different dimensions of family regulation. It has distinguished the private law of the family, which concerns the status and rights and duties connecting individuals to one another, from the public law of the family, through which government programs attach duties and benefits to individuals in the light of their relationships. Thus, the legal recognition of some relationships is asymmetrical: in Quebec, unmarried couples are recognized by the public law of the family but not by the private. The study has also distinguished reasons and bases for recognizing family relationships. Instrumental

recognition uses the family relationship so recognized to achieve some purpose, usually a distributive one. Symbolic recognition occurs when a legal status has intrinsic value. As for bases for recognition, formal recognition such as marriage or parentage attaches to a formal status, one that comes into existence at an identifiable moment. Marriage and parentage are examples of formal bases for recognition of relationships, ones engaging instrumental and symbolic dimensions. Each status brings an intrinsically valuable recognition of a legal family bond as well as entailing rights and duties. A functional basis for recognition is the way that individuals have acted toward one another. Lawmakers usually use functional recognition for instrumental purposes, but recognition of relationships on this basis typically does not pursue the symbolic dimension. Thus, the recognition of a support duty on the part of a de facto parent is seen, instrumentally, as serving the best interests of the child; it is not cast as the state's affirmation of the bond between adult and child.

These oppositions are not merely descriptive devices. The paper's argument, normatively, is that these three oppositions have appropriate roles to play in the development of a sound family policy. Moreover, confusion and poor policy can result from a failure to analyze claims and policy concerns and possible solutions by their light. In setting out specific recommendations that aim to reduce potential confusion and incoherence, however, a clarification is in order. Reducing incoherence does not mean the unification of family law or definitions of family relationships; rather, varying instances of contemporary family practices merit legal recognition in some respects but not others. The key mission for policy-makers is to assure that asymmetry or irregularity of recognition is an intended part of a larger policy plan, and not happenstance. Moreover, it is crucial to ensure that individuals understand the consequences of their family relationships so that they can take appropriate steps to protect themselves and those they care for.

As a matter of political theory, a legislature has scope to determine the relative weight of the different dimensions of family law and policy operative within its boundaries. Regarding the basis for recognizing family relationships, the common-law provinces typically show a mix of formal and functional approaches. By contrast, the private law of Quebec favours almost exclusively the formal bases for recognition: consensual marriage or civil union in the case of adult relationships, filiation in the case of adults and children. Recent judgments and disputes hint at implicit limits on the scope of legislative action here. Where social practices and legal definitions of family move too far out of line, it appears that judges will feel pressure and aim to reduce the gap. Thus, as noted, judges in Quebec occasionally use a general rule enshrining the best interests of children in order to reach results not otherwise permitted by the formal bases for family recognition in the Civil Code. Indeed, the striking contrasts emerging from Quebec – between its innovative and robust public policy in family matters and its high rate of unmarried cohabitation, on one hand, and its focus on formally defined families in its private law, on the other – invite further reflection. There must be ways, faithful nevertheless to Quebec's civil-law tradition, that the private law of the family can better reflect contemporary family life in that province.

The other argument throughout the study has concerned the gap between formal and substantive equality. Legislatures have reformed their family law so as to eliminate gendered distinctions between men and women. The achievement of formal equality in family law represents important progress, one that it is easy to overlook without awareness of how recently things differed so much. Yet, economic equality has not followed, which points to the limits of reforms to the private law as a means to secure the economic well-being of Canadian families. Where a household divides into two households on family breakdown, no distributive rule and no enforcement mechanism can tackle the root problem of insufficient overall resources. However important the determination and enforcement of private support obligations, there remains a robust role for public programs.

Notes

1 *A.A. v. B.B.* (2007), 83 O.R. (3d) 561, 2007 ONCA 2, leave to appeal to S.C.C. refused (*sub nom. Alliance for Marriage and Family v. A.A.*), [2007] 3 S.C.R. 124, 2007 SCC 40.

2 *Civil Marriage Act*, S.C. 2005, c. 33.

3 Admittedly, other regulatory orders, such as religious traditions, define family relationships. This paper's chief concern, however, is the state law of the family.

4 The Quebec Research Centre of Private and Comparative Law defines the civil law's institution of filiation as the "[l]egal relationship uniting a child with his or her mother or father" and, more broadly, as a "[b]ond of kinship linking a person to his or her ascendants, irrespective of the degree of relationship" (1999, 52).

5 Another possible distinction, which the study does not develop, lies between corrective and distributive theories of justice. Spousal support awarded on a compensatory basis or an award for unjust enrichment can be seen to serve corrective justice, while a step-parent's one-way duty of support to a child seems more purely distributive.

6 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

7 Art. 185 C.C.L.C.

8 *Divorce Act*, S.C. 1967-68, c. 24.

9 The court might order maintenance if it thought it "fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them" (*Divorce Act*, S.C. 1967-68, c. 24, s. 11(1)).

10 For example, *Family Law Act*, R.S.O. 1990, c. F.3, s. 30; art. 585 C.C.Q.; also art. 392.

11 *Family Law Act*, R.S.O. 1990, c. F.3, Preamble.

12 Art. 396 C.C.Q.

13 R.S.C. 1985, c. 3 (2d Supp.).

14 Statistics Canada, CANSIM database, table 101-6505.

15 For example, *Family Law Act*, R.S.O. 1990, c. F.3, s. 5(1); art. 416 C.C.Q.

16 Art. 415, para. 2 C.C.Q.; *Family Law Act*, R.S.O. 1990, c. F.3, s. 4(1) "property"; *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43.

17 For example, *Family Law Act*, R.S.O. 1990, c. F.3, s. 52(1)(a).

18 Art. 391 C.C.Q. While the family patrimony overshadows them in households of relatively modest means, two other key features appear in Quebec's Civil Code. First, the compensatory allowance, based on principles of unjust enrichment, aims to restore an economic equilibrium between the spouses (arts. 427ff. C.C.Q.). Second, the Civil Code's default matrimonial regime is partnership of acquests (arts. 432, 448ff. C.C.Q.). For their assets outside the family patrimony, spouses who do not arrange otherwise by contract are subject to rules that require the sharing of the value acquired during the marriage.

19 As a consequence of the constitutional division of powers, which confers on the Parliament of Canada exclusive power over Indians and lands reserved to Indians, provincial legislation regarding matrimonial property does not apply to First Nations reserves (Cornet and Lendor 2002; Ruru 2008). The unavailability of rules of property division has caused substantial difficulty for Aboriginal women. While policy-makers have studied the problem for years, it was only in March 2008 that Parliament introduced legislation to address this issue. It remains to be seen if the 40th Parliament will revive the initiative.

20 The point is most striking in Quebec, whose legislature has enacted the most stringent mandatory regime of property sharing by married spouses and where, according to the 2006 census, married couples represented 54.5 percent of census families, well below the national average of 68.6 percent (Milan, Vézina, and Wells 2007, 36). It is risky to presume that the robustness of the mandatory rules is a causal factor for the low marriage rate. At minimum, however, policy-makers in that province might ask whether it was the legislative intention that the core relationship regime for adult couples should operate in so relatively few households.

21 *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 15.2.

22 *Miglin v. Miglin*, *[2003] 1 S.C.R. 303, 2003 SCC 24.*

23 [1992] 3 S.C.R. 813.

24 *Yemchuk v. Yemchuk* (2005), 257 D.L.R. (4th) 476, 2005 BCCA 406.

25 Other issues concern the relation between the civil law of divorce and religious traditions in which one spouse has a role to play in securing the other's right to remarry religiously. For the sanction by civil damages for a husband's breach of his contractual obligation toward securing his wife's *ghet* (Jewish divorce), see *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 2007 SCC 54; Jukier and Van Praagh (2008); *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 21.1.

26 For example, *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22; and *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24.

27 A key exception is Quebec, where the regime of the family patrimony is a matter of public order, not susceptible to contract (art. 391 C.C.Q.), and where family matters may not be submitted to arbitration (art. 2639, para. 2 C.C.Q.). In contrast, the Code of Civil Procedure sets out a requirement in Quebec for an information session on the mediation process prior to family litigation (arts. 814.3ff.; Tétrault 2005, 176-94).

28 *Family Statute Law Amendment Act, 2006*, S.O. 2006, c. 1.

29 Criminal Code, R.S.C. 1985, c. C-46, s. 293(1).

30 *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(2).

31 Individuals have used the private-law model, but their doing so does not count as a means of recognition by family law.

32 Statistics Canada uses the term "common-law couple" to refer to unmarried cohabitants, taking pains to specify that common-law "is not a legal marital status" (Milan, Vézina, and Wells 2007, 10). This term risks confusion with the legal tradition of the common-law provinces as well as with the legal concept by which living together with intention to be married actually replaces the need for solemnization. Thus, although Statistics Canada publications refer to "common-law couples," this study refers to "unmarried couples."

33 Here is a category mistake: the distinguishing feature of the unmarried, opposite-sex couple is its formal legal status; the distinguishing feature of the same-sex couple is the sex composition of its members. Yet legislatures, judges and scholars operate as if they are comparable family forms vis-à-vis the traditional law of marriage.

34 For example, *Family Law Act*, R.S.O. 1990, c. F.3, s. 29, which defines "spouse" for the purposes of Part III, on support obligations, to include, in addition to married spouses, "either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

35 The exception here is Alberta, which extended its spousal-support regime to unmarried couples after a judgment by its Court of Appeal that its law discriminated, contrary to s. 15 of the Charter, on the basis of marital status: see *Taylor v. Rossu* (1998), 216 A.R. 348 (C.A.).

36 *Family Law Act*, R.S.O. 1990, c. F.3, s. 29 "spouse."

37 *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65.

38 *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, 1(1)(f).

39 [1999] 2 S.C.R. 3.

40 While almost invisible in the book on the family, de facto spouses have freedom of contract. Thus, if they agree to obligations such as those associated with marriage, such agreements are enforceable (Roy 2001). See *Couture v. Gagnon*, [2001] R.J.Q. 2047 (C.A.).

41 Milan, Vézina and Wells note that Quebec's rate of unmarried cohabitation far exceeds those in other countries such as Sweden, Finland, New Zealand and Denmark (2007, 35).

42 *The Family Property Act*, C.C.S.M. c. F25, ss. 13, 14, as am.; *Family Property Act*, S.S. 1997, c. F-6.3, ss. 4, 21(1), 22(1), as am.

43 [2002] 4 S.C.R. 325, 2002 SCC 83.

44 *Peter v. Beblow*, [1993] 1 S.C.R. 980; *B. (M.) v. L. (L.)*, [2003] R.D.F. 539, 231 D.L.R. (4th) 665 (Qc. C.A.). A further avenue in Quebec is the claim that the parties have an undeclared partnership.

45 *Law Reform (2000) Act*, S.N.S. 2000, c. 29; *Vital Statistics Act*, C.C.S.M. c. V60, s. 13.1, added by *The Common-Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48.

46 Arts. 521.1ff. C.C.Q.

47 Art. 521.6 C.C.Q. The equality of same-sex couples aside, some scholars argue that, by modelling civil union so closely on marriage, the legislature of Quebec missed an opportunity to introduce a suppler option that might have bridged the gap between de facto union and marriage (Pratte 2008).

48 Art. 521.13 C.C.Q.

49 [1995] 2 S.C.R. 513.

50 [1999] 2 S.C.R. 3.

51 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

52 For example, *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

53 R.S.O. 1990, c. F.3, s. 29 "same-sex partner," added by *Amendments Because of the Supreme Court of Canada Decision in* M. v. H., S.O. 1999, c. 6, s. 25, rep. by S.O. 2005, c. 5, s. 27(4).

54 *An Act to amend various legislative provisions concerning de facto spouses*, S.Q. 1999, c. 14.

55 For example, *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); and *Catholic Civil Rights League v. Hendricks*, [2004] R.J.Q. 851, 238 D.L.R. (4th) 577 (C.A.).

56 *Civil Marriage Act*, S.C. 2005, c. 33.

57 The 2006 census data show an increase of 32.6 percent in the number of same-sex couples from 2001, a growth rate (taken at face value) five times that for opposite-sex couples (5.9 percent) (Milan, Vézina, and Wells 2007, 12). As data on same-sex couples were first collected only in 2001, it may be reasonable to surmise that such couples underreported their presence in 2001. The closeness of the 2006 figure to comparable data from New Zealand, Australia and the United States hints that the 2006 figures may have stabilized and that the growth rate from 2001 is unlikely to repeat itself in 2011.

58 One exception might occur in relation to same-sex couples with children, where, in many cases, one partner is a genetic parent and the other is not. (Opposite-sex couples who use assisted reproduction or a surrogate mother may have one partner who is not a genetic parent of the child, but it is a necessary feature of same-sex couples.) Bowen (2008) argues that nonbiological mothers and second-parent adoptive fathers in same-sex couples sense a significant emotional power deficit.

59 *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83.

60 It is with such considerations in mind that the Quebec Research Centre of Private and Comparative Law states: "Notwithstanding the fact that the 1981 reform of family law...has eliminated the formal distinctions between natural and legitimate children, recognition of the equality between the natural family and the legitimate family has not been effectively incorporated into the body of the general law" (1999, 49).

61 While the Civil Code nowhere explicitly contemplates awarding a former de facto spouse a right of use to a dwelling to which she holds no title, some judgments show willingness to order a temporary right of use to a custodial parent to remain in a family dwelling with the children (LaSalle 2000; Tétrault 2008, 333-7).

62 From the European Court of Human Rights, see *Burden v. United Kingdom* (2008), 47 E.H.R.R. 38, rejecting a challenge to the *Civil Partnership Act 2004*; from Canada, see Casey (2008).

63 In this respect, the registration possibility of Alberta's *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, discussed above, is an outlier.

64 For an unsuccessful challenge under the Charter to Ontario's three-year threshold from a partner in a shorter cohabitation, see *Brebric v. Niksic* (2002), 60 O.R. (3d) 630 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vi.

65 In particular instances, the symbolic may overshadow the instrumental dimension – indeed, the latter may be almost nonexistent: consider the possibility of heirs of a deceased child claiming filial status within three years of his death (art. 536, para. 2 C.C.Q.).

66 For example, *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 1(1); art. 522 C.C.Q.

67 For example, *Act Respecting the Adoption of Children*, S.O., 11 Geo. V, 1921, c. 55; and *Act Respecting Adoption*, S.Q. 14 Geo. V, 1924, c. 75.

68 Contemporary efforts to reform adoption rules bear out further the movement between formal, symbolic recognition of relationships and the functional imperatives. Scholars increasingly discuss the right of adopted children to know their genetic origins, connecting that right to international law (Besson 2007). The "truth" of a child's origins is seen as having intrinsic value. Unsurprisingly, the child's so-called right to know interacts with the privacy interest on the part of parents who consented to their child's being placed for adoption. The Ontario legislature recently amended its law so as to enable the disclosure of personal information without the consent of the adoptee or birth parent, as the case may be. The law was concerned, retrospectively, with past adoptions. The Superior Court of Justice has held, however, that the law violated parties' reasonable expectation of privacy, running afoul of the right to liberty protected by s. 7 of the Charter (*Cheskes v. Ontario (Attorney General)* (2007), 87 O.R. (3d) 581 (S.C.J.)). The judgment points to the delicate balancing required in regulating adoption, a scenario in which adults make a decision with great impact on the child, without the child's knowledge and consent.

69 *Child and Family Services Act*, R.S.O. 1990, c. C.11, ss. 145.1, 153.6.

70 For example, *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 24 (where custody and access decisions must be made in the best interests of the child); *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(1) (where the paramount purpose of the statute is to "promote the best interests, protection and well being of children"); arts. 33 (where "[e]very decision concerning a child" is to be made "in light of the child's interests and the respect of his rights"), 543, para. 1, C.C.Q. (where no adoption is to take place except in the interest of the child); and *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), ss. 16(8) (where custody orders on divorce are to be made only in consideration of the best interests of the child) and s. 17(4) (a variation of

a custody order must be made only in the best interests of the child).

71 Consider that, although Quebec's presumption of paternity in favour of married spouses is rebutted if the child is born more than 300 days after a judgment ordering separation from bed and board (legal separation), the presumption revives if the spouses voluntarily resume living together before the birth (art. 525, para. 2 C.C.Q.).

72 Compare the Quebec legislature's addition of a new chapter on filiation by assisted procreation (arts. 538ff. C.C.Q.) with Ontario's recognition of assisted conception by amending the regulations made under its *Vital Statistics Act*, General Regulation, R.R.O. 1990, Reg. 1094, ss. 2(1) "assisted conception," "other parent," s. 2(2)2.

73 For example, *Re K* (1995), 23 O.R. (3d) 679 (Prov. Ct.); art. 578.1 C.C.Q.

74 Art. 541 C.C.Q. declares surrogacy agreements to be reputed null – that is, contrary to public order and unenforceable.

75 Art. 538.3 C.C.Q.

76 (2009), 94 O.R. (3d) 756, 2009 ONCJ 18.

77 For example, art. 546 C.C.Q.

78 Art. 538 C.C.Q.

79 *Jane Doe v. Alberta* (2007), 404 A.R. 153, 2007 ABCA 50, leave to appeal to S.C.C. refused (*sub nom. Doe v. The Queen*), [2007] 2 S.C.R. vi.

80 *A.A. v. B.B.* (2007), 83 O.R. (3d) 561, 2007 ONCA 2, leave to appeal to S.C.C. refused (*sub nom. Alliance for Marriage and Family v. A.A.*), [2007] 3 S.C.R. 124, 2007 SCC 40.

81 Arts. 532, para. 2, 538 C.C.Q.

82 For example, *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), ss. 16, 17(5); arts. 604, 612 C.C.Q.; and *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 20-21. The conditions for access may include restrictions on parental conduct oppressive to the children, although such restrictions are contentious, especially where involving religious practices (*Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; Harvison Young 2001, 770-3).

83 *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 16(9).

84 *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 16(10). While s. 16(10) privileges as much contact as is consistent with the best interests of the child, it establishes no presumption that contact per se serves the child's best interests. One concern is that the "friendly parent" rule, by which a parent seeking custody is induced to indicate a willingness to encourage access by the other parent, operates unjustly where there has been experience of violence (Boyd 2003).

85 *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231 at para. 54, 2006 SCC 37.

86 Federal Child Support Guidelines, SOR/97-175. For provincial guidelines, see, for example, Child Support Guidelines, O. Reg. 391/97; and *Regulation Respecting the Determination of Child Support Payments*, R.R.Q. c. C-25, r. 1.2.

87 The discretion in s. 4 of the Guidelines for judges to depart from the table amount in the case of payer spouses with income over $150,000 has predictably generated litigation from a class of parents able to afford it. In *Francis v. Baker*, [1999] 3 S.C.R. 250, the Supreme Court cautioned judges dealing with high-income payers not to depart too easily from the table amounts.

88 *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 2005 SCC 63. Quebec's rules for the determination of child-support payments differentiate between a noncustodial parent who assumes between 20 and 40 percent of the custody time and one who assumes less (*Regulation Respecting the Determination of Child Support Payments*, R.R.Q. c. C-25, r. 1.2, s. 4).

89 *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 56, 56.1(4) "child support amount."

90 For example, *Individual and Family Assistance Act*, R.S.Q. c. A-13.1.1, s. 63; and *Ontario Works Act, 1997*, S.O. 1997, c. 25, s. 59.

91 *C. (G.) v. V.-F. (T.)*, [1987] 2 S.C.R. 244.

92 Statistics Canada, CANSIM database, table 101-6512.

93 In *Droit de la famille – 072895* (2007), [2008] R.J.Q. 49, 2007 QCCA 1640, the Quebec Court of Appeal ordered shared custody of the children, on alternating weeks, to the former same-sex partner of the children's adoptive mother on the basis of her prior relationship with them. The court relied on art. 33 C.C.Q. (every decision concerning a child is to be made in the light of the child's best interests and rights) and the Charter of Human Rights and Freedoms, R.S.Q. c. C-12, s. 39 ("[e]very child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing"). The adoptive mother remained sole titulary of parental authority and the second woman acquired no parental status. Still, the judgment shows that the judges relied on rules outside the Civil Code's book on the family to recognize a functional model of family inconsistent with the Code's more restrictive, formal vision.

94 In Quebec, the reciprocal support obligations under the Civil Code operate only between married and civil-union spouses and between parents and children. Arts. 585, 599 C.C.Q.

95 Nova Scotia contemplates support owing by a child's guardian, but not by other nonparent figures. *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 8.

96 Ontario's *Family Law Act*, R.S.O. 1990, c. F.3, states, in s. 31(1), that every parent has an obligation to provide support for his or her child to the extent of his or her ability to do so; in s. 1(1), it defines "child" as including "a person whom a parent has demonstrated a settled intention to treat as a child of his or her family."

97 (1998), [1999] 1 S.C.R. 242.

98 The Court's statement as to the equality in obligation of parents and de facto parents is difficult to square with the Federal Child Support Guidelines SOR/97-175. Section 5 instructs a court, in the case of a spouse standing in the place of a parent, to award "appropriate" support having regard to the Guidelines and any parent's legal duty to support the child. This discretion implies that a de facto parent's duty of support may be secondary to a parent's.

99 *Cook v. Cook* (2000), 182 N.S.R. (2d) 299 (S.C. (Fam. Div.)).

100 *V.A. v. S.F.*, [2001] R.J.Q. 36 (C.A.). The restrictive approach does not stop the successful invocation of the provision in Quebec: see *R.J. v. B.G.*, 2006 QCCA 868, EYB 2006-106818, J.E. 2006-1329; and *Droit de la famille – 07617*, [2007] R.D.F. 579, 2007 QCCS 1253.

101 For example, Ontario's rules contemplate openness agreements in adoption; see *Child and Family Services Act*, R.S.O. 1990, c. C.11, ss. 145.1, 145.2. For discussion of legislative proposals relating to parental authority and the rights of third parties, to be debated by the National Assembly of France, see Savigneau (2009).

102 *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 31. Some scholars have expressed concern that the more robust, compensatory approach to spousal support in judgments such as *Moge* may make it easier for the state to download its responsibility for the costs of social reproduction (see, for example, Boyd 1994, 67). They fear that emphasis on privatized economic responsibility for family members might minimize a collective commitment to the economic well-being of all individuals, irrespective of the presence and economic status of a husband or father (Sheppard 1995, 323).

103 While it reaches beyond this paper's scope, it bears notice that a focus on families should not detract attention from the significant and growing number of one-person households. In 1941, only 6 percent of households consisted of one person; by 2006, 26.8 percent of households did so. One-person households grew by 13.5 percent from 1996 to 2001 and by 11.8 percent from 2001 to 2006 (Milan, Vézina, and Wells 2007, 16, 18). Assuming that people live in units of two and more overlooks the potential vulnerabilities of individuals living alone – for example, what kind of support may such individuals need as they advance through the life cycle? There are also implications for housing needs, as households with only one or two persons may require less living space than do larger households. The very idea of *family* law and policy risks obscuring the policy lens.

104 *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481 (C.A.).

105 The recognition of a new kind of family relationship in virtue of a successful claim under s. 15 of the Charter raises thorny issues of retroactivity: are public programs required to include the new relationships going forward or, retroactively, back to the coming into force of the equality guarantee? See *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429, 2007 SCC 10.

106 The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), generally refers to "spouses" and "common-law partners." Subsection 248(1) defines "common-law partner" as follows:

> "common-law partner," with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and (a) has so cohabited with the taxpayer for a continuous period of at least one year, or (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii), and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship.

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Families in the Eyes of the Law:
Contemporary Challenges and the Grip of the Past

Robert Leckey

Résumé

Que ce soit à propos de la légalité de la polygamie, des obligations des conjoints de fait ou encore du nombre de parents qu'un enfant peut avoir, les questions juridiques concernant la famille ont souvent fait la manchette au cours des dernières années. Sur la foi de ces reportages, on pourrait être tenté de conclure que la vie familiale contemporaine est souvent en contradiction avec le droit de la famille.

De fait, Robert Leckey montre dans cette étude que, en dépit des nombreuses réformes apportées au cours des années au droit de la famille pour prendre en considération l'évolution des comportements et des mœurs, ceux-ci ont évolué plus rapidement encore. Il note en outre que les règles juridiques encadrant la famille interagissent de manière cruciale avec les programmes publics, notamment en ce qui concerne l'égalité des sexes, la sécurité du revenu et le bien-être des enfants. Par conséquent, il est nécessaire d'avoir une bonne connaissance de l'état du droit pour pouvoir préciser le rôle du gouvernement vis-à-vis des familles.

Cette étude examine le droit de la famille au Canada, au niveau fédéral et provincial y compris le droit civil du Québec, et décrit les changements qui y ont été apportés au cours de la deuxième moitié du XX^{e} siècle. L'auteur présente d'abord les concepts qui structurent l'analyse et définit les quatre grandes oppositions qui sont au cœur du droit de la famille : 1) le droit public contre le droit privé ; 2) la reconnaissance symbolique d'une relation contre la reconnaissance pour raisons pratiques ; 3) la reconnaissance formelle d'une relation contre la reconnaissance fonctionnelle ; 4) l'égalité formelle contre l'égalité réelle.

L'auteur passe ensuite en revue les changements apportés aux lois sur le mariage et sur le divorce, notant en particulier les efforts visant à égaliser les droits et les responsabilités des époux. En étudiant les données sur le rôle économique des époux, il constate toutefois que cette égalité formelle dans la loi, contrairement aux attentes, ne s'est pas traduite en égalité réelle. Il montre aussi que les réformes se sont heurtées aux habitudes des personnes, réduisant d'autant leur portée. Ainsi, à la suite de l'acceptation sociale grandissante des relations non maritales, le mariage a perdu son monopole en tant que seule et unique forme familiale légitime, alors que la facilité d'accès et le recours au divorce ont réduit le caractère permanent de cette union. Bien que le mariage demeure la forme d'union la plus répandue pour fonder une famille au Canada, le tissu familial est aujourd'hui beaucoup plus diversifié.

De manière paradoxale, la réponse sur le plan juridique à cette diversité a été d'appliquer le modèle marital traditionnel à ces nouvelles formes familiales. L'auteur explore la reconnaissance juridique des unions de fait et des couples de même sexe, et avance que cette fixation sur le modèle traditionnel a pour effet de limiter la capacité du législateur de reconnaître d'autres types de relations significatives, par exemple les liens non conjugaux. Le Québec fait ici bande à part, car le Code civil est tout simplement silencieux quant aux droits et aux responsabilités des personnes vivant en union de fait.

Finalement, Leckey se penche sur les relations adultes-enfants. En ce qui concerne la reconnaissance de la figure parentale, il montre que le régime juridique est tiraillé entre le critère génétique, l'intention de devenir parent et la stabilité de la famille. Après avoir décrit comment le statut de parent a été établi en droit et avoir présenté les obligations et les droits des parents lorsqu'il y a séparation ou divorce, l'auteur envisage la possibilité de créer un statut intermédiaire conférant à une personne qui n'est pas un parent juridiquement parlant quelques obligations et droits parentaux.

D'une manière générale, Leckey soutient que, pour être cohérente et adéquate, une bonne politique familiale doit prendre en considération les diverses tensions qui traversent le droit de la famille et tenter de les intégrer. Selon lui, ces tensions sont incontournables dans une société pluraliste et, par conséquent, le rôle du législateur est de s'assurer que l'asymétrie de traitement ou de reconnaissance est intentionnelle et non le fruit du hasard. Il met également en garde contre la tentation de croire que l'égalité de droit se traduit nécessairement en égalité de fait, car l'inégalité économique persiste, notamment chez les familles monoparentales dirigées par une femme. De fait, il est difficile de soutenir deux ménages avec le même niveau de ressources lorsqu'un couple se sépare ou divorce. Cet exemple révèle bien les limites du droit privé comme outil d'égalité, d'où la nécessité de mettre en place de solides programmes sociaux.

En conclusion, Leckey propose diverses réformes et présente les grandes lignes directrices pour les politiques publiques destinées aux familles. Il fait plusieurs recommandations touchant le droit privé de la famille. Québec, par exemple, devrait adopter une obligation alimentaire réciproque pour les conjoints de fait qui ont eu au moins un enfant ensemble. Toutes les provinces devraient envisager d'octroyer un droit temporaire d'occupation de la résidence familiale à un ex-conjoint de fait qui a la garde des enfants. Il faudrait aussi qu'elles créent un statut intermédiaire entre le parent de plein droit et l'étranger et mettent sur pied un registre juridique pour les relations familiales non conjugales.

Summary

News stories about legal cases involving polygamy, how many parents a child can have, what unmarried partners owe one another and other family law issues have frequently made headlines in recent years. Based on these stories one might be tempted to conclude that contemporary family life and family law are often at odds.

Indeed, in this study, McGill University law professor Robert Leckey shows that while Canadian family law has evolved considerably over the past few decades, social practices and family relationships have changed even more dramatically and have outpaced the legal framework for families. He argues that these laws regarding family relationships interact crucially with public programs, especially in terms of gender equality, income security and children's well-being. Therefore, he says, a discussion of the appropriate role of government in relation to families requires a clear sense of the state of the law.

The study describes the changes to family law in Canada in the second half of the twentieth century and its broad outlines today (including federal, provincial, civil and common law regimes). The author first sets out the conceptual framework for the rest of the analysis, presenting four oppositions that are the source of tensions in family law: 1) public versus private law; 2) instrumental versus symbolic recognition of a given relationship; 3) formal versus functional recognition of a relationship; and 4) formal versus substantive equality.

Leckey reviews the changes to marriage and divorce law in the last 50 years, notably those to equalize spousal rights and duties. Looking at data on the economic roles of spouses, he finds that legislative equality in marriage and divorce has not produced economic gender equality to the extent expected. At the same time, marriage rates have declined, so fewer couples benefit from the current regimes.

While marriage remains the most common family form in Canada, the landscape of Canadian families reflects increasing pluralism. Indeed, the increased social acceptability of relationships outside marriage has diminished marriage's claim to the position of sole legitimate family form, while increased access and recourse to divorce have made marriage less permanent.

Paradoxically, the legal response to greater pluralism in family forms has been to treat more couples like married spouses. Leckey explores the legal recognition of same-sex and unmarried couples and shows that legislators have tended to base their treatment of these non-traditional forms of union on the traditional marriage model. He argues that this focus on marriage can impede recognition of other forms of nonconjugal relationships. Quebec stands out in this regard, since the Civil Code is silent regarding the duties of unmarried spouses toward one another.

Finally, the author turns to parents and children and shows that in today's legal regimes for recognizing parentage, there are contradictory concerns about genetic linkages, intention to parent and family stability. Having described how legal parental status is established and outlined parents' legal rights and obligations when the family breaks down, the author then examines the implications of recognizing the parental rights and obligations of individuals who do not have full parental status.

Overall, the author argues that a coherent and sound family policy must strike a balance between the tensions within family law. These tensions, he says, are an inevitable feature of family law in a plural society. The key mission for policy-makers, in his view, should be to ensure that asymmetry or irregularity of recognition is an intended part of a larger policy plan, and not happenstance.

He also cautions that formal equality does not necessarily result in substantive equality. Indeed, despite significant law reforms to provide equality, economic disadvantage in certain types of families persists (for example, in female single-parent households). This reflects the limits of private law and the fact that, in many cases, the family resources are insufficient to support two households after unions break down, hence the need for robust social programs.

In concluding, Leckey discusses avenues for further legal changes, and he sets out guidelines for the design of public programs that support families. He makes several recommendations in relation to private family law. Quebec, for instance, should enact a reciprocal obligation of support on the part of de facto spouses who have had a child together. In addition, all the provinces should

- provide for a possible right of temporary occupancy of a family residence on the part of a former unmarried partner who has custody of children;
- look at creating a status between those of parent and legal stranger; and
- consider creating or expanding registration options for family relationships other than conjugal couples.